Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

80-544

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
JEFFREY M. SCHWARTZ

Milman, Naness & Pollack
1175 West Broadway
Hewlett, N.Y. 11557
(516) 569-1288

Counsel for the Petitioner

Question Presented

Whether an employer's unilateral decision to terminate a losing portion of its operations solely for legitimate business reasons breaches the duty to bargain under Section 8(a)(5) of the National Labor Relations Act.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of The Case	2
The Board's Conclusions of Law and Order	5
The Decision of the Court of Appeals	6
Reasons for Granting the Writ	7
I. The Writ Should be Granted to End the Conflict Among Circuits Concerning the Duty to Bargain Over Economically Motivated Decisions to Discontinue a Portion of a Subsisting Enterprise	7
A. *Fibreboard* and *Darlington:* Limited Inroads On Employer Prerogatives	7
B. Conflict Among The Circuits: Divergent Interpretations Of *Fibreboard* And *Darlington*	9
II. The Decision Below is Erroneous, Misapplying This Court's Decisions in *Fibreboard* and *Darlington*	13
Conclusion	17
Appendix A	
Judgment of the Court of Appeals	1a
Opinion of the Court of Appeals	3a

PREVIOUS PAGE WAS BLANK

PAGE

Decision and Order of the National Labor Relations Board 21a

Decision of the Administrative Law Judge 27a

Appendix B

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5), 158(d)..... 38a

TABLE OF AUTHORITIES

Cases PAGE

Brockway Motor Trucks, Div. of Mack Trucks, Inc., 251 N.L.R.B. No. 23 (1980) 10

Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978) 10

Brooks-Scanlon, Inc., 246 N.L.R.B. No. 76 (1979) ... 9

William J. Burns International Detective Agency, Inc., 148 N.L.R.B. 1267 (1964) 10

Empire Dental Co., 211 N.L.R.B. 860 (1974) 10

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) ..... *passim*

First National Maintenance Corp., 242 N.L.R.B. No. 72 (1979) 1

General Motors Corp., 191 N.L.R.B. 951 (1971) 5, 9

Lauer's Furniture Stores, Inc., 246 N.L.R.B. No. 58 (1979) 10

Metro Transportation Services Co., 218 N.L.R.B. 534 (1975) 10

Morrison Cafeterias Consolidated, 177 N.L.R.B. 591 (1969) 10

Morrison Cafeterias Consolidated v. NLRB, 431 F.2d 254 (8th Cir. 1970) 10, 11

National Family Opinion, Inc., 246 N.L.R.B. No. 84 (1979) 10

NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) 11

NLRB v. William J. Burns International Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965) 10, 11, 15

Cases PAGE

NLRB v. Drapery Manufacturing Co., 425 F.2d 1026 (8th Cir. 1970) 11

NLRB v. First National Maintenance Corp., No. 79-4167 (2d Cir. July 9, 1980) 6, 7, 12, 15, 16

NLRB v. North Carolina Coastal Motor Lines, Inc., 542 F.2d 637 (4th Cir. 1976) 10, 12

NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961) 12

NLRB v. Edward M. Rude Carrier Corp., 79 Lab. Cas. 21,633 (4th Cir. 1976) 12, 15

NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969) 12, 15

NLRB v. Transmarine Navigation Co., 380 F.2d 933 (9th Cir. 1967) 12, 13

North Carolina Coastal Motor Lines, Inc., 219 N.L.R.B. 1009 (1975) 10

Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) ...5, 6, 9, 11

Pine Valley Division of Ethan Allen, Inc., 218 N.L.R.B. 208 (1975) 10

Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) 11, 15

Stanley Oil Co., 213 N.L.R.B. 219 (1974) 9

Summit Tooling Co., 195 N.L.R.B. 479 (1972) 9

Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263 (1965) .....*passim*

International Union, United Auto Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) 5, 9

PAGE

Statutes

National Labor Relations Act

29 U.S.C. § 158(a)(1) 2, 5
§ 158(a)(3) 2, 8, 10, 12, 14
§ 158(a)(5) ..... *passim*
§ 158(d) 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, First National Maintenance Corporation, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a)[1] is reported unofficially at 104 L.R.R.M. 2924. The findings of fact, conclusions of law and order of the National Labor Relations Board (App. A at 9a) are reported at 242 N.L.R.B. No. 72 (1979).

---

1 "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the judgment and opinions of the court below, and the decisions and orders of the National Labor Relations Board and the Administrative Law Judge. Appendix B contains the relevant provisions of the National Labor Relations Act.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit enforcing the Board's order was entered on July 9, 1980. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(a)(1), 8(a)(3), 8(a)(5) and 8(d). They are set forth in Appendix B.

STATEMENT OF THE CASE

The petitioner provides housekeeping and maintenance services for various customers (A. 2).[2] It hires its own employees, and, as their sole employer, trains and supervises them in the performance of the contracted-for services at the customer's premises (A. 2). There is no interchange of petitioner's employees between customer locations (A. 85). During the spring and summer of 1977, the petitioner serviced between two and four nursing or old age homes, including the Greenpark Care Center in Brooklyn, where this case arose in July of that year (A. 84). Petitioner had been under contract with Greenpark since April 1976, and employed approximately 35 people in its operation there (A. 62-63).

Petitioner had first contracted on April 28, 1976 to provide services at Greenpark (A. 43-45). Under the agreement, and an annexed manual which described the overall basis for the services, petitioner furnished all necessary labor, supervision, training, tools, equipment and supplies required to do the work in a competent manner without interfering with the

---

2 "A." refers to the Appendix in the Court of Appeals.

operations of the Center. In return, Greenpark provided necessary storage space, paid a management fee and reimbursed the petitioner for its gross weekly payroll and fringe benefits. (A. 43.)

Either party had the right to terminate the agreement at any time by serving the other with 30 days' prior written notice (A. 4). The agreement provided that, upon its termination, the Center would be prohibited from hiring any of petitioner's former employees for a period of 90 days (A. 44). In March 1977, the Center served such notice on petitioner because of the maintenance staff's purported lack of efficiency (A. 4). The parties were able to resolve this problem and the notice was rescinded (A. 4).

On March 31, 1977, the Board conducted a secret ballot election among petitioner's employees at Greenpark. On May 11, the Board certified District 1199[3] as the representative of those employees. On July 12, District 1199 wrote to petitioner (apparently for the first time) noting its certification and its right to bargain and negotiate a contract for petitioner's employees working at Greenpark, and concluded: "We look forward to meeting with you or your representative for that purpose." (A. 2, 39.)

In the meantime, on June 30, 1977, petitioner orally requested that the Center increase the management fee by $500 a week and advised the Center that if such an increase were not forthcoming the petitioner would discontinue its services effective August 1 (A. 72-73). A confirming mailgram to this effect was sent on July 6 (A. 40).

The April 28, 1976 agreement had set the management fee at $500 a week (A. 44). Effective November 1, 1976, the fee was reduced to $250 a week; it remained at that level through July 31, 1977, when petitioner withdrew from Greenpark

---

3 District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

(A.38, 46, 78). It is uncontroverted that petitioner was losing money at Greenpark (A. 4).

Petitioner met with representatives of the Center on July 25 and was unable to negotiate an increase in the management fee (A. 74-75). Therefore, that same day, petitioner wrote to Greenpark to advise it that all services would be discontinued effective at midnight on July 31 (A. 41).

Petitioner advised its employees on July 28 that they would be terminated on July 31 (A. 3, 77). Upon hearing of this, a representative of District 1199 called one of petitioner's principals and asked if the union could wait a while before withdrawing and terminating the employees (A. 3, 79-80). Petitioner explained that if it stayed on beyond July 31 it would have to continue for another 30 days and that petitioner "couldn't afford it" (A. 80, 85). Petitioner suggested that the union representative discuss the matter with the Center to see if it would waive the 30-day notice provision. Given such a waiver, petitioner said, it "might be able to swing it so we would be able to sit down and talk about it." The representative of the union contacted the Center and was advised that it would have to get clearance from its attorneys. (A. 94.) The next day (July 29) the Center informed the union that it would not waive the 30-day notice provision (A. 98, 99).

Petitioner withdrew from Greenpark on July 31. On August 1, the representative of District 1199 met with the owner and other representatives of the Center and asked, among other things, if the Center would hire petitioner's former employees. (A. 99-101.) The union was then advised that a 90-day provision in the Center's contract with petitioner precluded it from hiring or keeping those people on the premises (A. 100). There is no evidence that the union requested that petitioner waive this provision.

The Board's Conclusions of Law and Order

The Board, substantially adopting the conclusions of law of the Administrative Law Judge, found that petitioner had violated Section 8(a)(5) by unilaterally closing its Greenpark operation without bargaining with the union about the decision and by failing to respond to the union's July 12, 1977 request for bargaining. The Board further accepted the ALJ's finding that by so refusing to bargain, petitioner had interfered with its employees' exercise of rights guaranteed to them under Section 7 of the Act, and thereby had violated Section 8(a)(1). The Board applied the doctrine it had established in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), as modified by *General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972), that an employer has a duty to bargain over a decision to close a portion of its business unless that decision involves "such a significant investment or withdrawal of capital as to affect the scope and ultimate direction of the enterprise" (App. A at 8a-9a, 20a-21a).

The Board's order directed petitioner to bargain with the union with respect to the decision to terminate its operation at the Greenpark facility and, in the event petitioner did not resume the Greenpark operation, with respect to the effects of the decision to terminate.[4] The Board also directed petitioner to reinstate the discharged employees if the Greenpark operation was resumed, and, if the operation was not resumed, to place the discharged employees on a preferential hiring list for employment in other operations. Finally, the Board ordered back pay for the discharged employees from

---

4 The portion of the decision regarding "effects" was not a contested subject at the Board level, and is of no concern here. In a stipulation entered into prior to the submission of briefs to the court below, petitioner consented to the enforcement of the Board's order directing petitioner to bargain over the effects of its termination at Greenpark. In that stipulation the parties agreed that effects bargaining took place subsequent to the administrative hearing, with petitioner agreeing to the payment of severance pay to the affected employees. (A. 21-22.)

the date of discharge to the date of any agreement or impasse reached in collective bargaining with the union. (App. A at 11a-15a.)

The Decision of the Court of Appeals

The court of appeals, acting upon the petition of the Board pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by a 2-1 vote (App. A at 7a). The court expressly declined to follow the *per se* approach established by the Board in *Ozark Trailers*, *supra*, but rather held that this Court's decision in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), supports a presumption that there is a duty to bargain over a decision to close a portion of an ongoing business (App. A at 4a-5a).

The court observed that there are conflicting positions in the circuits and a lack of clear direction under *Fibreboard* (App. A at 3a-4a). It reasoned that a partial closing "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute" (App. A at 5a). The court said that this presumption could be rebutted by a showing that the "purposes of the statute would not be furthered by imposition of a duty to bargain," but found that no such showing had been made in this case (App. A at 5a, 6a). Specifically, the court found that there was "sufficient reaso. to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits . . . or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee" (App. A at 6a).

Judge Kearse, dissenting, would have denied enforcement of the Board's order on the ground that this Court's "carefully limited decision in Fibreboard . . . [does not require petitioner] to bargain over its decision to terminate" the Greenpark operation, especially since the losses suffered were unrelated to labor costs (App. A at 7a). She concluded that petitioner's decision "to conserve its capital by closing a losing

operation was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework' " (App. A at 8a, quoting from *Fibreboard Paper Products Corp. v. NLRB*, *supra*, 379 U.S. at 214).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO END THE CONFLICT AMONG CIRCUITS CONCERNING THE DUTY TO BARGAIN OVER AN ECONOMICALLY MOTIVATED DECISION TO DISCONTINUE A PORTION OF A SUBSISTING ENTERPRISE.

The decision below conflicts with decisions in the Courts of Appeals for the Fourth, Eighth and Tenth Circuits, as discussed below, pp. 13-16, *infra*. This conflict results, as we show preliminarily, from divergent understandings of this Court's decisions in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). Review is required to resolve this conflict and to supply needed guidance on a recurrent question of importance to the economy and to the promotion of labor-management harmony.

A. *Fibreboard* And *Darlington:* Limited Inroads On Employer Prerogatives.

In its 1964 *Fibreboard* decision, this Court concluded that "the replacement of employees in [an] existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . . is a statutory subject of collective bargaining under § 8(d) of the Act. 379 U.S. at 215. In the opinion for the Court, Mr. Chief Justice Warren announced that this "decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." *Id.*

In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Douglas and Mr. Justice Harlan, wrote that *Fibreboard* "most assuredly does not decide that every managerial

decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty." *Id.* at 218. Further, as the concurring Justices noted:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.* at 223.]

The limited holding of *Fibreboard*, carefully drafted to discourage anything other than the most cautious extension of the duty to bargain into core areas of entrepreneurial decisionmaking, was followed by a similarly restrained holding in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). There, this Court concluded that an employer, even if motivated by anti-union animus, could lawfully close a portion of its enterprise (in this instance, terminating production at one location) if in so doing it was not seeking to chill unionism in the remaining portions of the enterprise and the employer could not reasonably have foreseen that such a closing would be likely to have that effect. 380 U.S. at 275. Although the Labor Board had found a refusal to bargain in violation of Section 8(a)(5) based on the allegedly discriminatory closing of a portion of the business in violation of Section 8(a)(3), this Court pointed out that this "finding was in part based on the determination that the plant closing was an unfair labor practice, and [that] no argument . . . [was] made that § 8(a)(5) requires an employer to bargain

concerning a purely business decision to terminate his enterprise. *Cf. Fibreboard Paper Products Corp. v. Labor Board* . . . ." 380 U.S. at 267 n.5 (citation omitted). In these circumstances, there was no need for this Court to reach the issue presented here; namely, whether there is an obligation to bargain concerning an economically motivated decision to close a losing portion of an ongoing business.

During the decade and a half that has elapsed since *Fibreboard* and *Darlington* were decided, the courts of appeals have grappled with this question. As we demonstrate below, the decisions are in substantial conflict.

B. Conflict Among The Circuits: Divergent Interpretations Of *Fibreboard* And *Darlington.*

Despite the carefully limited thrust of the *Fibreboard* opinions, the Labor Board, with very narrow exceptions, has in essence applied a *per se* rule, known as the *Ozark Trailers* doctrine,[5] requiring employers to bargain about economically motivated decisions to terminate a portion of an enterprise.[6] This rule is applied whether the terminated portion is a

---

5 *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966).

6 The Board allows that there is no duty to bargain over a partial closing decision where the closing removes the employer from a line of business or where factors beyond the control of the employer prompt the decision, such that discussion would be pointless. *See, e.g., Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76 (1979) (no duty to bargain over decision to close sawmill due to insufficient supply of timber), *Stanley Oil Co.*, 213 N.L.R.B. 219, 224-25 (1974) (no duty to bargain over decision to withdraw entirely from equipment servicing business); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972) (no duty to bargain where practical effect of decision was to remove employer from tool manufacturing business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972) (no duty to bargain over transfer to a franchisee of leasehold interest and operating control of company-owned facility pursuant to policy of disposing of line of business).

manufacturing facility or, as in this case, a service operation,[7] and irrespective of the wisdom of the decision in terms of efficient allocation of the resources of the enterprise.[8] In response to this approach, the courts of appeals have reached conflicting decisions.

The Courts of Appeals for the Fourth, Eighth and Tenth Circuits have held that there is no duty to bargain over an economically motivated decision to terminate a portion of a business enterprise in the absence of anti-union animus violative of Section 8(a)(3). On the other hand, the Second Circuit here held that there is a presumptive duty to bargain, rebuttable only if it subsequently can be shown that bargaining somehow would not have served the purposes of the Act. The Third Circuit has also established a bargaining presumption, but one based upon somewhat different considerations; namely, a balancing of the employees' interest in preservation of employment against the employer's interest in effecting an expeditious decision to alter the scope of its business. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735-38 (3d Cir. 1978).

---

7 *See, e.g., Metro Transp. Servs. Co.*, 218 N.L.R.B. 534, 536 (1975) (closing of one of two local pickup and delivery service operations); *Morrison Cafeterias Consol.*, 177 N.L.R.B. 591, 595-97 (1969), *enforcement denied*, 431 F.2d 254 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267, 1268 (1964); *enforcement denied*, 346 F.2d 897 (8th Cir. 1965) (termination of last security services contract in one market). *Cf. Empire Dental Co.*, 211 N.L.R.B. 860, 866-68 (1974) (closing of in-house dental clinic laboratory followed by contracting out of laboratory work). *But see Brockway Motor Trucks, Div. of Mack Trucks, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB, supra*, 582 F.2d 720 (3d Cir. 1978) (where total liquidation not contemplated at time of decision to close single facility, economic justification for not bargaining held insufficient) (appeal pending).

8 *See, e.g., National Family Opinion, Inc.*, 246 N.L.R.B. No. 84 (1979) (closing and contracting out of printing operations by survey research organization), *Lauer's Furniture Stores, Inc.*, 246 N.L.R.B. No. 58 (1979) (closing of subsidiary on verge of bankruptcy followed by sale of all stock); *North Carolina Coastal Motor Lines, Inc.*, 219

The Court of Appeals for the Eighth Circuit, squarely at odds with the position adopted by the Second and Third Circuits, has consistently found no duty to bargain over partial closing decisions, whether the terminated portion is a plant or a service operation. This position was most recently and cogently restated in *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976), where the court made it clear that it does not

> adopt the Board's view, which it has continued to press since its holding in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), that an employer operating two or more plants is obligated to bargain with respect to a decision to close one of those plants. We squarely rejected that holding in *NLRB v. Drapery Manufacturing Co.*, *supra*, 425 F.2d at 1027-28, and reaffirmed our adherence to the view set forth in *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 110-13 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 . . . (1966), that, absent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons. *See also Morrison Cafeterias Consolidated, Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970). [533 F.2d at 1039.]

In *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965), the same rationale was applied to the discontinuance of a service operation. More particularly, the court refused to uphold the Board's ruling that Burns' unilateral decision to terminate its only remaining service contract in Omaha constituted an unlawful refusal to bargain:

N.L.R.B. 1009, 1014 (1975); *enforced on other grounds*, 542 F.2d 637 (4th Cir. 1976) (decision to phase out uneconomical portion of trucking operations); *Pine Valley Div. of Ethan Allen, Inc.*, 218 N.L.R.B. 208, 220 (1975) (shutdown of some plant operations and auction of equipment after default on loans).

> The rationale of Fibreboard as applied to the facts of this case does not support the Board's decision. Under Darlington, the finding of lack of antiunion motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union on the cancellation of the Creighton contract and the closing of the Omaha division. [346 F.2d at 902.]

The Fourth Circuit has adopted a substantially similar position, refusing to find a violation of Section 8(a)(5) where the employer's decision to close a part of its business is not motivated by anti-union animus constituting a violation of Section 8(a)(3) under *Darlington*. In *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. 21,633 (4th Cir. 1976), the court held that an employer "ha[d] not abrogated its bargaining obligations" where there was no substantial evidence of anti-union motivation and "[t]he company's representative testified without contradiction that for almost two years before finally writing off this portion of its organization, the employer had considered the total cancellation of it because dissatisfied with the profits. . . ." 79 Lab. Cas. at 21,635-36. *Accord, NLRB v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976) (dictum).

In a similar fashion, the Tenth Circuit, citing *Darlington*, has held that a company "solely motivated by a sound economic reason, ha[s] no duty to bargain on the decision" to close a portion of its business. *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969). The court also cited with approval the decision of the Ninth Circuit in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967),[9] which held that a

---

9 The conflict between the Tenth and Second Circuits, and the divergence of views between the Ninth and Second Circuits, are accentuated by the Ninth Circuit's reliance in *Transmarine* on an earlier Second Circuit decision, *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In *Rapid Bindery*, the Second Circuit held that the decision to transfer work from one plant to another and to

> [c]ompany's decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner, is not a subject of mandatory collective bargaining within the meaning of § 8(a)(5). *A decision of such fundamental importance to the basic direction of the corporate enterprise is not included within the area of mandatory collective bargaining.* [380 F.2d at 939; emphasis added]

II. THE DECISION BELOW IS ERRONEOUS, MISAPPLYING THIS COURT'S DECISIONS IN *FIBREBOARD* AND *DARLINGTON*.

In the view of this petitioner, the decision below resolves erroneously a major problem left open in *Fibreboard*, misconceiving both the legal premises of that decision and the factual character of the situation to which it is now extended.

In *Fibreboard*, this Court held only that bargaining was required in the factual setting of that case as to "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 215. Focusing on that limited situation, this Court provided a mode of analysis calling for reference not merely to the statutory words but also to legislative history, industrial practice and the practical suitability of the topic for collective bargaining. *Id.* at 210-13. The concurrence of three Justices was announced on grounds even more narrowly confined. *See id.* at 224 (Stewart, J., concurring).

---

close the first plant "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion." 293 F.2d at 176. In the Ninth Circuit's view, the reasoning and conclusions of the Second Circuit in *Rapid Bindery* were "sound and consistent with the principles of *Fibreboard*." 380 F.2d at 939. In contrast, the majority opinion in the present case strongly suggests that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* holding. *NLRB v. First Nat'l Maintenance Corp.*, No. 79-4167 (2d Cir. July 9, 1980) (App. A at 4a).

Mr. Chief Justice Warren, writing for the majority, observed that imposing a duty to bargain on those facts "would not significantly abridge [the employer's] freedom to manage the business," *id.* at 213, and the three concurring Justices, concerned about the "implications . . . of disturbing breadth" contained in the majority opinion, noted that "[n]othing the Court holds . . . should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions . . . which lie at the core of entrepreneurial control." *Id.* at 218, 223 (Stewart, J., concurring).

This concern was echoed by Mr. Justice Harlan (one of the concurring Justices in *Fibreboard*), writing for the majority in *Darlington*, holding that the Labor Board's failure to make adequate findings as to the employer's anti-union motivation was fatal to its finding of a violation of Section 8(a)(3) "[i]n an area which trenches so closely upon otherwise legitimate employer prerogatives." 380 U.S. at 276.

Obviously reflecting careful thought, the opinion of Judge Lasker began by tracking the several factors, only beginning but certainly not ending with the literal words of Section 8(d), that underlay the decision of this Court (and, still more clearly, the concurrence) in *Fibreboard*. Nevertheless, when it came to the actual resolution of the problem in this case, the court allowed itself, in our view, to be led astray by a narrow and undue focus upon the bare words "terms and conditions of employment."

The partial closing, the court said, "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute" (App. A at 5a).

With that much stated, the court proceeded directly to its "presumption" that this is a mandatorily bargainable subject. But that pretermits the difficulties presented by this subject. After all, the loss of jobs is not less a consequence of a total shutdown or liquidation. What the decisions make clear is that the loss of jobs is at most the beginning of the analysis.

The central task neglected in the decision below is defining the area of "managerial decisions . . . which lie at the core of entrepreneurial control." *Fibreboard*, *supra*, 329 U.S. at 223 (Stewart, J., concurring). When that effort is undertaken, it should lead, in our submission, to the proposition in the quoted concurrence:

> Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.*]

And that would lead in this case, as it has repeatedly in the rulings of other circuits, to a recognition that the Greenpark closing, like similar judgments on closing or terminating installations or branches or lines of production, is not mandatorily bargainable. *See*, *e.g.*, *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976) (dicta); *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. 21,633, 21,635-36 (4th Cir. 1976); *NLRB v. Thompson Transport Co.*, 406 F.2d 698,703 (10th Cir. 1969); *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897, 902 (8th Cir. 1965). The dissent of Judge Kearse is sound, we think, in treating the decision to terminate as one that "was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework' " (App. A at 8a, quoting from *Fibreboard*, *supra*, at 223 (Stewart, J., concurring)).

It is not true on the present record, as it was in *Fibreboard*, that the "facts . . . illustrate the propriety of submitting the dispute to collective negotiation." 379 U.S. at 213. The majority opinion below, as we read it, proceeded by conjecture and speculation in treating the "facts" as if they pointed in a similar direction. So, for example, having created a presumption of mandatory bargainability, that opinion at once posited and destroyed a ground for defeating the presumption by suggesting that "bargaining could reasonably

be expected to modify or reverse [the] decision" of the employer to terminate at Greenpark (App. A at 6a). To buttress that thought, the court said:

> the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. [*Id.*]

Not only does this thought lack basis in the record, but the realities appear to be quite to the contrary. First, Greenpark had no bargaining relationship with the union and was not obligated to deal with it in any way. Second, not only was the Center not required to deal with the union, Greenpark even refused to waive the 30-day stay-on provision in its contract with petitioner, something that might have allowed petitioner to remain at the Center for less than an additional month and to meet with the union (A. 99). Finally, had Greenpark been willing to suggest a reduction in staffing in order to increase petitioner's management fee, it had ample opportunity to do so in negotiations with the petitioner that took place on June 30 and on July 25, 1977 (A. 72-75).

In these circumstances, the anticipation by the court of appeals of possible concessions by Greenpark that might have allowed petitioner to remain there serves to display the unrealism, and the consequent unsoundness, of the court's rationale.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

October 6, 1980

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
JEFFREY M. SCHWARTZ

Milman, Naness & Pollack
1175 West Broadway
Hewlett, N.Y. 11557
(516) 569-1288

Counsel for the Petitioner

Appendices

Appendix A

Judgment of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-4167

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
Circuit Judges

HON. MORRIS E. LASKER,
District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FIRST NATIONAL MAINTENANCE CORP.,

Respondent.

A PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk

by

(Sgd.) ARTHUR HELLER,
Deputy Clerk

Opinion of the Court

NLRB v. FIRST NAT'L. MAINTENANCE CORP.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NATIONAL LABOR RELATIONS BOARD

v.

FIRST NATIONAL MAINTENANCE CORP.,

No. 79-4167, July 9, 1980

Application for enforcement of an NLRB order (242 NLRB No. 72). Enforcement granted.

William R. Stewart, Deputy Assistant General Counsel and L. Joseph Ferrara (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with them on brief), for petitioner.

Milman, Naness & Pollack (Sanford E. Pollack, of counsel), Hewlett, N.Y., for respondent.

Before TIMBERS and KEARSE, Circuit Judges, and LASKER, District Judge.*

Full Text of Opinion

LASKER. District Judge:—This case presents the issue whether an employer has the duty to bargain with the union representing its employees as to a decision to close part of its operations.

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

The National Labor Relations Board (NLRB or the Board) seeks enforcement of its order of May 23, 1979[1] which, based on the findings of the Administrative Law Judge that First National Maintenance Corporation (FNM) violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), by refusing to bargain with the union[2] representing certain of its employees, directs FNM to bargain with the union, to reinstate those employees, and to grant them back pay.

I.

FNM is in the business of providing cleaning and maintenance services to commercial customers. During the spring of 1977, FNM serviced between two and four nursing homes. The approximately 35 employees who staffed its operation at the Greenpark Care Center (Greenpark) chose the union as their representative on March 31, 1977 and the NLRB certified the union on May 11th. On July 12th, the union wrote to FNM requesting a meeting to negotiate a collective bargaining agreement. There is no evidence that FNM responded to that letter.

During the spring and summer of 1977, FNM determined that it was losing money at Greenpark, and discontinued its services there as of August 1st. It did not notify the union before taking this action. On July 28th, FNM informed its Greenpark employees that they would be discharged on July 31st.

The same day, the union's vice president, Edward Wecker, telephoned FNM's secretary-treasurer and one-third shareholder, Leonard Marsh, requesting that FNM "stay on" at Greenpark. Marsh answered that FNM could not continue its

---

1 The NLRB's order is at 242 NLRB No. 72, 101 LRRM 1177.

2 The Union elected and certified is District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

operation there because of financial reasons. When Wecker asked whether they could meet to discuss the situation, Marsh said, " 'We have nothing to discuss.' " The union and FNM had no further communications until the unfair labor practice charges were filed.

The NLRB found that FNM had violated Section 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), and ordered FNM to bargain with the union upon request as to the decision to close its Greenpark operation; if the Greenpark services were resumed, to offer reinstatement to the discharged employees, and if no agreement to resume operation were reached, to bargain as to the effects of the closing and to establish preferential hiring for the terminated employees at its other operations. The order also awarded back pay to the discharged employees.

II.

FNM does not dispute that it had a duty to respond to the July 12th letter sent by the union requesting a meeting to negotiate a collective bargaining agrvement, and the parties have stipulated as to FNM's duty to bargain as to the effects of the Greenpark closing. Consequently, the only issue before us relates to FNM's duty to bargain as to its decision to terminate its Greenpark services.

Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), together make it an unfair labor practice for an employer to refuse to bargain with the union "with respect to wages, hours and other terms and conditions of employment." See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964). The present issue, then, is whether the decision to close the Greenpark operation affected the employees' "terms and conditions of employment" within the meaning of the statute.

The seminal case on the subject is Fibreboard Paper Products Corp. v. NLRB, supra, 379 U.S. 203 (1964). There the Court held to be an unfair labor practice the employer's refusal to bargain as to the decision to contract out plant maintenance work formerly performed by its employees. Id. at 215.

The Court found that

> "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.' . . . A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."

Id. at 210 (citation omitted). The Court based its decision not only on the language of the statute but on the premise that requiring an employer to bargain in the circumstances would promote the purposes of the statute, that such a requirement was supported by industrial bargaining practices in the country, and that it "would not significantly abridge [the employer's] freedom to manage the business." Id. at 210-11, 213.

Accordingly, the Court held

> "that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

Id. at 215 footnote omitted).

Although the decision in Fibreboard takes us part of the way, it does not fully determine the issue here: the obligation of an employer to bargain in the case of the closing of part of his facilities. Fibreboard was expressly limited to its facts, and they are distinguishable on the grounds that Fibreboard involved a less significant change in the employer's business. In Fibreboard, after the decision to contract out, the business continued to operate unchanged except for the use of the employees of the subcontractor for those of Fibreboard performing the same work under the same conditions. On the other hand, in a partial closing case, a portion of the employer's business—of course, how large a portion varies with each case—ceases to operate altogether.

Moreover, in Fibreboard, the Court did not specify how the three considerations which it noted—the statute's purpose, industrial practice, and the employer's entrepreneurial prerogative—related to the initial finding whether the statute literally applied. Consequently, it is unclear whether the duty to bargain imposed in Fibreboard derived solely from a finding that the case fell within the literal reach of the statutory language or whether some or all[3] of the additional considerations noted by the Court are necessary to the imposition of a duty to bargain.

The lack of clear direction provided by Fibreboard on this point is made even more difficult by the conflicting positions taken by the NLRB and most circuit courts that, since Fibreboard, have addressed the issue of the duty to bargain in the case of a proposed partial closing.

In Ozark Trailers, Inc., 161 NLRB 561 (1966), the NLRB held to be a subject of mandatory bargaining the decision to close one of the multiple truck manufacturing plants operated by the employer. The Board disagreed with the view espoused by two circuit courts, see NLRB v. Royal Plating & Polishing

---

3 This interpretation that all of the Fibreboard "factors" are a prerequisite to a duty to bargain is set forth in the discussion at 47 Geo. Wash. L. Rev. 679, 699 (1979).

Co., 350 F.2d 191 (3d Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), that the decision whether to impose a duty to bargain should depend on how "significant" or "major" is the change contemplated by the employer. The Board noted that a significant change in the employer's business is likely to be significant from the employees' perspective as well.

> "And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood."

The Board also found that the purpose of the statute—to promote industrial peace—would be served by finding that the employer had a duty to bargain, and that the subject was suited to bargaining because one of the reasons for the Ozark closing was the cost of labor. Finally, the Board noted that imposition of a duty to bargain would not significantly abridge the employer's freedom to conduct his business, since

> "an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accomodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision."

On the other hand, the circuit courts until recently have generally declined to impose a duty to bargain as to a partial closing when the decision to close was based on the employer's desire to effect a shift in capital or a major change in its business, NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), or was due to severe economic loss or other considerations beyond the employer's control, Royal Typewriter Co. v. NLRB, 533 F.2d

1030, 1039 (8th Cir. 1976) (dicta); NLRB v. Thompson Transport Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). But see NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 517 (5th Cir.), cert. denied, 385 U.S. 935 (1966); NLRB v. American Manufacturing Co., 351 F.2d 74, 80 (5th Cir. 1965).[4]

Recently, in an opinion that exhaustively discussed the relevant legal precedent and policy considerations, the Third Circuit treated the question whether bargaining was mandatory as to a partial closing.[5] In Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-35 (3d Cir. 1978), the court rejected a per se rule in favor of "an initial presumption, founded on statutory purposes and language, that a partial closing is a mandatory subject of bargaining," followed by an examination of the facts of each case and balancing the parties' interests in compelling bargaining or not.

On the one hand "[o]f chief concern to the employees is the prospect of losing their jobs. It is in fact difficult to imagine

---

4 In NLRB v. Rapid Bindery, Inc. 293 F.2d 170, 176, (2d Cir. 196l), the Second Circuit held that the decision to transfer work from one plant to another and to close the first plant

> "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made, 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

This decision does not compel a result contrary to that reached here since it pre-dates Fibreboard, in which, as indicated, the decision to contract out work which resulted in the layoff of employees was held to be a mandatory subject of bargaining.

5 A provocative treatment of Brockway may be found in Comment, *Duty To Bargain About Termination of Operations:* Brockway Motor Trucks v. NLRB, 92 Harv. L. Rev. 768 (1979).

any result of a decision by the employer about which labor would be more highly sensitized." Id. at 735 (footnote omitted). Accordingly, a union would naturally seek to bargain with the employer to attempt to find a way to avoid closing the facility. On the other hand, the interest of the employer in not bargaining asserted in Brockway was its "freedom to determine the company's direction" unhindered. Id. at 738.

Although the court found no evidence in the record—such as severe economic difficulties or action of a third party which would render bargaining futile—suggesting that imposition of a duty to bargain would interfere with that freedom, id. at 738-39, it refused to enforce the Board's order because the record was unclear as to the precise nature of the employer's interest in not bargaining. Id. at 740.

III.

It may be argued that a per se rule, although rejected in Brockway, 582 F.2d at 731-34, should be adopted: either imposing a duty to bargain whenever an employer closes part of its business (although the NLRB does urge this position), or absolving the employer of a duty to bargain whenever the decision to close is based on economic considerations (which is FNM's position). Yet we agree with the Third Circuit that a per se rule is inappropriate in an area whose parameters are not clearly defined by the statute or by Supreme Court precedent.

Although the rationale of Fibreboard is not altogether clear, we believe that the decision at least supports the rejection of a per se rule imposing a duty to bargain, since such a rigid approach would ignore additional relevant considerations such as the three mentioned by the Court. Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction. In rejecting the contention that the employer should not have to bargain because its decision was based on economic considerations, the Court stated:

> "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

379 U.S. at 214; see Brockway, supra, 582 F.2d at 739.

We also agree with the Brockway court that the correct approach is to establish a presumption that a duty to bargain exists. A partial closing[6] affects "terms and conditions of employment" at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute. Equally important is the fact that it is the employer who has access to the facts surrounding the decision to close, and consequently is in a position to justify its making that decision without first bargaining over it.

---

6 In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263(1965), the Supreme Court held that

> when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."

Id. at 273-74 (footnote omitted). The Court distinguished a "partial" closing, however, and held that

> "a partial closing is an unfair labor practice under 8(a) (3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

Id. at 275. That case did not involve the question whether the employer's decision constituted a mandatory subject of bargaining, as the Court noted that

> "no argument is made that 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. Fibreboard Paper Products Corp. v. Labor Board, 379 U.S. 203."

Id. at 267 n.5.

Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case.

However, we disagree with Brockway that a determinative factor should be a balancing of the respective interests of the employer and employees in bargaining. We believe that the determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations of whether the purposes of the statute are furthered by the decision to impose a duty to bargain in a particular case.

Accordingly, the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain. Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration. The employer might overcome the presumption by demonstrating that bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer's decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off was small and the number of the remainder was large.[7]

---

7 The dissent maintains that despite our purported rejection of a per se rule favoring the imposition of the duty to bargain, in effect one has been adopted. This is not so because, as discussed in the text above, our ruling would exclude the imposition of a duty to bargain on a showing that the purposes of the statute would not be furthered

IV.

Turning to the present case, the decision to close the Greenpark operation clearly falls within the literal language of the statute. That decision terminated the employment of FNM's 35 employees there, and, as the Supreme Court has said, the words "terms and conditions of employment" do "plainly cover termination of employment." Fibreboard, supra, at 210.

FNM has offered no evidence to rebut the presumption arising from the literal application of the statute, but merely asserts that it was losing money on Greenpark. However, as discussed above, although certain considerations generally relating to economics may render bargaining futile and therefore nonobligatory, FNM has not shown that to be true of the considerations it claims prompted its decision to terminate the Greenpark operation.[8]

The dissent, noting that, as the Administrative Law Judge found, the company was losing money at Greenpark, argues that FNM was not required to bargain over the decision to terminate the Greenpark operation because those losses were not attributable to labor costs, since under the contract between Greenpark and FNM Greenpark paid FNM's employees' salaries and fringe benefits, plus a management fee. We believe, however, that the critical question is whether the purposes of the statute are advanced by imposition of a duty to bargain and that that determination does not depend

---

by mandating bargaining in a particular case. We have suggested several examples of situations in which such a showing might be made.

8 The dissent, relying on Justice Stewart's concurrence in Fibreboard, concludes that FNM's decision was "a matter of fundamental entrepreneurial discretion." Although we have indicated our agreement that certain decisions may be within managerial prerogative and not subject to mandatory bargaining, the appropriate analysis to determine whether such a decision is involved in the case at hand is to inquire whether the imposition of a duty to bargain would further the purposes of the statute.

solely on whether the costs precipitating the decision to terminate were not labor originated. What appears to us to be the decisive factor, is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision. On the record here, for example, there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. Moreover, the dissent appears to us to be unsound in placing emphasis on the question whether the company's difficulties are attributable to non-labor costs alone. As we see it, such difficulties are the product of the company's entire history and arise from the sum of the costs involved in running a business.

Accordingly, we find that FNM had a duty to bargain with the union as to its decision to close the Greenpark operation.[9]

FNM argues that it nevertheless did bargain with the union on July 28th and 29th, and therefore satisfied its duty to bargain as to its decision to close its Greenpark services.

However, the telephone conversations, initiated by the union, consisted of little more than Marsh informing Wecker that FNM was "pulling out" of Greenpark for financial

---

9 In Brockway, the court declined to enforce the NLRB order and remanded because of the insufficient factual record to enable it to balance the employer's interest in not bargaining. 582 F.2d at 739-40. That course is unnecessary here. Neither party has claimed, and we do not find, that the record is insufficient to permit determination of the question before us. see Electrical Products Division of Midland-Ross Corp. v. NLRB, No. 78-2556, Slip op. at 8-9, 103 LRRM 2908 (3d Cir. March 18, 1980).

reasons and that there was "nothing to discuss."[10] It is difficult to conceive of conduct which more clearly constitutes a failure of good faith bargaining to an impasse.

V.

FNM argues that the Board abused its power by ordering FNM to reinstate the terminated employees and awarding them backpay. The Board answers that FNM failed to except to the remedy before the Board and is therefore precluded from objecting to it here.

A condition to the right to object to the enforcement of a remedy ordered by the NLRB is that the party opposing must have excepted to the remedial portion of the order before the NLRB. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); National Labor Relations Act 10(e), 29 U.S.C. 160(e).

FNM contends that its exceptions to the ALJ's decision and its accompanying brief objected to the remedial portion of the order. This is simply not supported by the documents[11] themselves which do not mention the remedy ordered.

FNM next argues that the General Counsel's cross-exceptions to the decision questioned the relief ordered and "fully bring the question of remedial relief before the Board within the meaning of Section 10(e)." However, the Board's

---

10 Marsh stated during the telephone conversation that if FNM stayed at Greenpark one day, it was then bound to stay for a full 30 days. There was also some discussion concerning the possibility of persuading Greenpark to waive the 30-day contractual provision.

11 The exceptions to the ALJ's decision were:

"1. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent was under a duty to bargain with the Union over the decision to terminate the contract with Greenpark Care Center. . . ."

"2. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent failed to bargain with the Union over the effects of its decision to close the operation. . . ."

exceptions did not object to the remedy ordered. Rather they requested further relief in addition to that ordered. The General Counsel's exceptions could not have the effect of notifying the NLRB that FNM "intend[ed] to press the specific issue it now raises." NLRB v. Seven-Up Bottling Co., supra, 344 U.S. at 350.

The petition for enforcement is granted.

Concurring and Dissenting Opinion

KEARSE, Circuit Judge, concurring in part and dissenting in part:—I must respectfully dissent from so much of the majority's decision as holds that respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(5), 158(a)(1) by refusing to bargain over its decision to close its Greenpark operation, and I would therefore deny enforcement of so much of the NLRB's order as directs respondent to pay backpay to the employees terminated.

I

There is no question that respondent failed to bargain with the union, nor any question that it was required to bargain over the effects of its decision to terminate its operations at Greenpark Care Center ("Greenpark"). See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961); Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965). To this extent I would affirm the Board's findings that respondent violated the Act.

I cannot agree, however, that respondent violated the Act by refusing to bargain over the decision to terminate. The decision to end services at Greenpark was made in order to stop losing money. This is not a case in which, as the majority states, the respondent "merely asserts" that it was losing money on the Greenpark operation. The record indicated that

during the spring of 1977 respondent had repeatedly sought an increase in its fee in order to enable it to continue services at Greenpark, stressing to Greenpark's management that respondent was losing money. The Administrative Law Judge ("ALJ") found this assertion to be true: *"It is a fact the Respondent was losing money on this job."* (Emphasis added.)

Further, in the present case the contract between respondent and Greenpark required Greenpark, in addition to paying a set management fee, to pay respondent's "gross weekly payroll and fringe benefits" for that facility. It was the amount of the management fee, over and above the labor costs, on which respondent and Greenpark could not agree. Thus, the facts are that respondent was losing money on the Greenpark job, that its losses were not due to labor costs,[1] and that its solution for these losses was to close down the losing operation.

I do not believe that the carefully limited decision in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), or any other authority, requires the respondent to bargain over its decision to terminate Greenpark in order to halt these losses.[2] See Morrison Cafeterias Consol. Inc. v.

---

1 This distinguishes such cases as Ozark Trailers, Inc., 161 NLRB 561(1966) in which the company's actions were prompted in large part because of the cost of labor. Even in a case where a partial closing is due to labor costs, it may be that a labor union's legitimate interests are adequately protected by the employer's duty to bargain over the effects of the closing, as distinguished from the decision itself to close. There is no need to reach that question here.

2 The majority states that, like the Third Circuit in Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), it recognizes merely a presumption, and not a per se rule, that there is a duty to bargain over a partial closing. Looking at the results of the two cases, however, it appears to me that the majority comes rather near to imposing that per se rule. In Brockway, the parties had stipulated that the partial closing was based on "economic considerations." The nature of these considerations was not disclosed in the record, and thus it could not be known whether or not that respondent had actually been losing money on the closed operation. In those circumstances the presumptive duty to bargain was not adequately rebutted. Yet the

NLRB, supra. In Fibreboard the Supreme Court ruled that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" violated the requirement of § 8(d) of the Act that an employer bargain about "conditions of employment ." Id. at 215. Unlike the present case, Fibreboard involved the replacement of employees in an ongoing operation. (And unlike the present case the costs sought to be shaved in Fibreboard were labor costs.) The opinions in Fibreboard are instructive in distinguishing its "contracting out" situation from that of the present case.[3] Thus, the majority opinion observed as follows:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.
>
> The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors

---

Brockway court did not grant enforcement, but denied the Board's petition without prejudice. In the present case, the established facts are considerably less compelling from the Board's point of view. There is a record on which the ALJ expressly found that in fact respondent was losing money; and the record shows that those losses were not due to labor costs. Yet here, the majority promptly grants enforcement.

3 Far from deciding such questions as a decision to terminate an operation altogether, Fibreboard did not purport to reach even "other forms of 'contracting out' or 'subcontracting.' " Id. at 215.

> that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . .

Id. at 213-14. Justice Stewart's concurring opinion stresses that certain managerial decisions, such as the decision to close a business, which obviously will affect employment, do not implicate "conditions of employment" within the meaning of § 8(d):

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. at 223.

I conclude that the respondent's decision in this case to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not "suitable for resolution within the collective bargaining framework."

II

Respondent has challenged in this Court both the order directing it to reinstate terminated employees and the backpay

award. The Board argues that these questions are not properly before the Court because respondent's letter of exceptions to the ALJ's decision was "silent on remedy and too general in form to have placed the Board on notice that the Company objected to the remedy in the event its position did not prevail." (Board brief at 21.) This position has some merit with respect to the Board's direction that respondent offer to reinstate terminated employees in comparable positions in other facilities served by respondent; that order was properly based on respondent's failure to bargain over the effects of its termination decision, and I would agree that respondent is barred from attacking that portion of the remedy.

Nevertheless, I would not hold the respondent barred from challenging the backpay award, because that award is based on the determination that the company violated the Act by failing to bargain over the termination decision itself. Since I find this premise faulty, I find no basis for the backpay award and would deny enforcement of that portion of the Board's order. NLRB v. Rapid Bindery Inc., supra, 293 F.2d at 177.

Decision and Order of the National Labor Relations Board

242 NLRB No. 72

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29—CA—5808

FIRST NATIONAL MAINTENANCE CORP.

and

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL—CIO

DECISION AND ORDER

On November 24, 1978, Adminstrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified.[1]

---

1 The General Counsel excepts, *inter alia*, to the failure of the Administrative Law Judge to find additional violations of Sec. 8(a)(1) and (5) based on the allegations in the complaint that Respondent failed to bargain with the Union prior to its termination of its operation at the Greenpark Care Center. The Administrative Law Judge made all the necessary factual findings with respect to these allegations but failed to set forth his conclusions. We adopt his factual findings, and based thereon conclude that Respondent in violation of Sec. 8(a)(5) and (1) refused to bargain with the Union by failing to

The Adminstrative Law Judge found, and we agree, that Respondent violated both Section 8(a)(5) and (1) of the Act when it refused to bargain about its decision to discontinue its operation at the Greenpark Care Center and the effects thereof on the unit employees. To remedy these violations the Administrative Law Judge's recommended Order requires Respondent to bargain with the Union about the decision and its effects and to provide for backpay for the terminated employees from the date of their termination until one of the four stated conditions is met. The General Counsel urges that these provisions be adopted. However, he contends that certain additional remedies should be provided to protect the rights of the employees under the Act. We find merit in certain of these contentions.

The termination of this operation and the consequent loss of employment by its employees stemmed from Respondent's failure to bargain over that decision and its effects at a time when a measure of union bargaining power existed. As meaningful bargaining can be assured here only if some economic strength is restored to the Union, and a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices Respondent has committed, we deem it necessary, in order to effectuate the purposes of the Act, to order the following remedy which provides redress with a view toward restoring the bargaining conditions, as nearly as possible, to those which would have existed but for Respondent's illegal conduct.

1. We shall order Respondent to bargain, upon request, with the Union as the exclusive bargaining representative of the employees in the appropriate unit with respect to the decision to terminate its operation at the Greenpark Care Center and the possible resumption thereof. If Respondent agrees to resume its Greenpark Care Center operation, it shall

---

respond to the Union's letter dated July 12, 1977, demanding such bargaining.

offer all those terminated employees in the appropriate unit reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, and shall embody any understanding reached in a signed agreement.

2. If Respondent fails to agree to resume its Greenpark Care Center operation, Respondent shall be required to bargain, upon request, with the Union with respect to the effects on the unit employees of the decision to terminate the Greenpark Care Center operation, and shall establish a preferential hiring list of all employees in the appropriate unit following a nondiscriminatory system, such as seniority. Respondent shall offer the terminated employees who were employed at the Greenpark Care Center operation reinstatement to positions at any of their other cleaning and maintenance operations which become available, by the discharge, if necessary, of any persons employed since July 31, 1977, the date the Greenpark Care Center operation was terminated. Respondent and the Union shall reduce to writing any agreement reached as a result of such bargaining.

3. Further, we shall order Respondent to make whole the employees in the appropriate unit by payment of backpay from July 31, 1977, the date of their termination, until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on the subjects pertaining to the decision to close its Greenpark Care Center operation and the effects of the closing upon the unit employees;[2] (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; (4) the subsequent failure of the Union to bargain in good faith. Backpay, less earnings during the applicable period, shall be computed on the basis set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest computed in

---

2 *Mobil Oil Corporation*, 219 NLRB 511 (1975); *P. B. Mutrie Motor Transport, Inc.*, 226 NLRB 1325 (1976).

the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We have found that Respondent refused to bargain following the certification. In order to insure that the employees will be accorded the services of their selected bargaining agent for the period provided by law, the initial year of certification will begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, First National Maintenance Corp., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL—CIO, hereinafter the Union, as the exclusive bargaining representative of their employees in the following appropriate unit:

> All housekeeping employees employed at Greenpark Care Center, exclusive of all other employees, technical and professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive bargaining representative of all employees in the aforesaid appropriate unit, and further bargain with respect to its decision to terminate its operation at the Greenpark Care Center and possible resumption of operations and, if an understanding is reached, embody such understanding in a signed agreement and offer reinstatement to the terminated employees of this operation. If Respondent fails to resume its operation at Greenpark Care Center, in accord with the section of this Decision entitled "The Remedy, Respondent shall bargain with the Union concerning the effects of the decision to terminate said operation, establish a preferential hiring list of all employees in the appropriate unit following a nondiscriminatory system, bargain about its mode of operation, and offer to its terminated employees in the appropriate unit reinstatement to positions for which they are qualified at any of their other cleaning and maintenance operations, discharging, if necessary, persons employed since July 31, 1977. Any understanding reached shall be embodied in a signed agreement.

(b) Make whole those employees of Respondent who were discharged from that location on July 31, 1977, by payment of backpay in the manner and for the period set forth in this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in New York, New York, copies of the attached notice marked "Appendix"[3] and mail copies thereof to all employees of Respondent who were employed at its Greenpark Care Center operation at the time of its termination. Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. May 23, 1979

HOWARD JENKINS, JR., *Member*

BETTY SOUTHARD MURPHY, *Member*

JOHN C. TRUESDALE, *Member*

NATIONAL LABOR RELATIONS BOARD

---

3 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision of the Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE 29-CA-5808

FIRST NATIONAL MAINTENANCE CORPORATION
and

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

STEPHEN E. APPELL, ESQ., for the General Counsel.

SANFORD E. POLLACK, ESQ. of Gutterman & Pollack, of Valley Stream, NY, for the Respondent.

MR. EDWARD A. WECKER, Vice President, and SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ, ESQS., of New York City, NY, for the Charging Party.

DECISION

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held before Administrative Law Judge Benjamin K. Blackborn, on July 5, 1978, in Brooklyn, New York City. The charge was filed on August 3, 1977, by District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, here called the Union, against First National Maintenance Corporation, here called the Respondent, or the Company, and the complaint issued on October 7, 1977. The issue presented is whether the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union as required by law. A brief was filed by the Respondent. Before issuing a decision Judge Blackburn died. On November 8,

1978, the Board's Chief Administrative Law Judge designated the undersigned to prepare and issue a decision on the existing record.

Upon the entire record I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a New York State corporation, with its principal office and place of business in New York City, New York, is engaged in providing and performing housekeeping, cleaning and maintenance services and related services for various commercial customers. During the past year, a representative period, it purchased and caused to be transported and delivered to its place of business cleaning products and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

During the spring of 1977 the Respondent, by contract and as a separate employer, was doing the maintenance work for the Greenpark Care Center, a nursing institution in Brooklyn, New York, here called Greenpark or the Home. Its employees at that location totalled about 35. The Respondent hires workmen to do like maintenance for other commercial enterprises under separate contract at other locations, just how many the record does not show. Asked how many other nursing homes his company services, Leonard Marsh, an

officer of the Respondent and one third owner, answered: "I would venture to guess between two and four." It was an evasive answer, unless the Respondent's overall operations are so extensive the secretary-treasurer cannot keep in mind how many are of a particular type.

In any event, on March 31, 1977, the Respondent's employees at this one location voted in a Board-conducted election and chose the Union as bargaining agent; on May 11 the Regional Director certified the Union as exclusive bargaining representative. I will assume Respondent was formally advised soon thereafter in writing by the Board, as is always the case in Board representation proceedings. Later, by letter dated July 12, the Union wrote the Company, reminded it of the certification and asked for a meeting to negotiate a contract. The Company never answered the letter. On July 28, 1978, Marsh, of the Company, told all of the employees working for him at this Home that 3 days later, July 31, all of them would be discharged. Not one of them had had any prior notice of the intended action. Informed, that same day, of what was about to happen, Edward Wecker, vice-president of Local 1199, immediately communicated with Marsh, and with Mr. Pelman, administrator of the Home, in a panic attempt to delay matters with the hope of averting disaster to the employees. All Wecker got from Marsh on the telephone was that it was a matter of money and that it was too late to do anything about it or even discuss the matter at all. The people were fired on July 31, and Marsh never did meet with any representative of the Union.

However phrased, the essential allegation of the complaint is that this unilateral change in the conditions of employment of employees represented by a certified exclusive bargaining agent, without even a semblance of opportunity to the Union to speak on their behalf, was a direct violation of the statutory obligation to bargain, and therefore an unfair labor practice under Section 8(a)(5) and (1) of the Act. That the Respondent knew—before uttering one word to the Union or to the employees of its intent—that the employees were regularly and

lawfully represented by an exclusive agent, cannot be questioned. In fact, Marsh had for over 2 weeks been holding, and ignoring, the Union's written request for bargaining. And that the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear. When an employer's work complement is represented by a union and he wishes to alter the hiring arrangements, be his reason lack of money or a mere desire to become richer, the law is no less clear that he must first talk to the Union about it. This Respondent did not. And when Wecker tried to talk with the owner, he was faced with mere restatement of a fait accompli. He may have tried to stall matters, but Marsh was impervious, for economic reasons I am sure, but stone deaf nonetheless. This is a big company. For all I know the 35 men at this particular home were only a piddling part of its total business in the New York area. If Wecker had been given an opportunity to talk, might something had been worked out to transfer these people to other parts of the Respondent's business? The cases speak of an employer's duty, when he cannot avoid reducing his staff, to discuss its "effects" with their bargaining agent. Entirely apart from whether or not open discussion between the parties—with the Union speaking on behalf of the employees as was its right—might have persuaded the Respondent to find a way of continuing this part of its operations, there was always the possibility Marsh might have persuaded the Home to use these same employees to continue doing its maintenance work, either as direct employees or as later hires by a replacement contractor. Yet there never was any talking, any meeting, any opportunity to the Union for bargaining with the Respondent.

On the face of the story, there appears a very clear unfair labor practice. What really remains for consideration are the defense arguments made by the Respondent.

Its principal defense is the contention that the parties did in fact negotiate about this entire matter, and that therefore in no event can there be a finding of refusal to bargain. Called as

an adverse witness by the General Counsel, owner Marsh had difficulty remembering anything, including statements of fact appearing in telegrams he had himself written. Repeatedly his answers were: "It could be," "It is possible," "I can't recall," "Maybe," etc. This about what must have been a significant experience for his company, what with the financial loss it suffered at this particular job. These observations are made here because the testimony of Wecker, which stands uncontradicted (Marsh did not testify in defense about the now asserted bargaining at all) must be believed. All Marsh could recall about talking with Wecker was that the Union agent spoke with him on the telephone, asked why he was quitting the job and would he remain another month, and that his only reply was he was losing money and "couldn't afford" to remain. Marsh also admitted his company never responded to the Union's demand letter of July 12 and never offered to discuss the discharges of all these people with their union.

It is a fact the Respondent was losing money on this job. As far back as March 17, 1977, the Home gave it 30 days notice of cancellation of their contract because of the maintenance staff's lack of efficiency. Apparently the two companies straightened things out and the work continued. On June 30 they talked and the Respondent asked for a $500 weekly raise in "profits," meaning, I suppose, a raising of the fee paid for the services, and on July 6 Marsh informed the Home in writing that unless the increase were granted his company would discontinue the work on August 1. By telegram dated July 25 he gave such final notice. And, as stated above, the employees were first informed on July 28 about the intended discharges to come 3 days later.

Wecker testified that that same day, July 28, he spoke twice with Marsh on the phone, always he calling the Respondent. Wecker first asked Pelman, of the Home, could he keep the employees on and Pelman said no, because as he read the contract between the Home and the Respondent the Home was precluded from even considering hiring these employees for 90 days. Talking then to Marsh, Wecker asked what was

going to happen to the employees, but the only answer he got was that the Respondent was "pulling out" because it was not receiving enough money. Wecker then asked ". . . could he [Marsh] hold on a little longer until we could sit down and discuss the matter and see how to keep the people working," and again Marsh said "no," this time on the ground that he would have to stay a full 30 days if he stayed even one, according to the contract. Marsh told Wecker if he, Wecker, could persuade Pelman to waive the 30 day clause, "he might be able to swing it so we could be able to sit down and discuss it." Still on the phone, Wecker asked about possible employment at other locations of the Respondent, and received only a simple negative. Wecker's final statement as a witness was: "I asked that we meet and try to discuss the matter. He said, 'We have nothing to discuss.' "

The Respondent calls this brief talk on the telephone that day full bargaining to impasse over both the decision to discharge and its effects upon all the 35 employees. I disagree. What these facts show in totality is that the Respondent from the very start had no intention of considering either the employees' or the Union's opinion or desire in this mass discharge. Marsh simply refused to meet with the Union or to discuss anything, although obligated to do so in law. His indifference to the statutory obligation was first manifested by the Respondent's failure even to respond to the demand for bargaining received on July 12. To say no more than "it is a money problem," or "we cannot afford not to discharge the people," is a far cry from exchanging views and thoughts as to how, if possible, the economic hurt could be avoided or at least reduced. I find the Respondent in fact refused to talk with the Union about an absolutely mandatory subject of collective bargaining.

As to law, the defense argues that its decision to cancel out this particular one of the many simultaneous operations was not a mandatory subject of collective bargaining. In support it cites an occasional case where the Board found exactly the opposite of the Respondent's present view, but where a Court

of Appeals disagreed. A hearing examiner in these proceedings is bound to apply Board law, unless reversed by the Supreme Court. See, *Ozark Trailers, Inc.*, 161 NLRB 561, 566.

> If ever there was a business in which taking on, finishing, or discontinuing this or that particular job is no more than a regular and usual method of running its affairs, it is this Respondent's overall activity. There was no capital involved when it decided to terminate the Greenpark Center job. The closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size. The Board's language in a very recent decision is particularly applicable here: ". . . where it has not been shown that Respondent's decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of the enterprise,' we conclude that by refusing to bargain with the Union concerning the decision to close the . . . facility, Respondent has thereby violated Section 8(a)(5) and (1) of the Act." *Brockway Motor Trucks*, 230 NLRB 1002. See, also, *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203.
>
> A substantial element in the legal argument by the Respondent here is that there was no way of keeping these 35 employees on the job, that talk would have been futile anyway because the Greenpark location was a losing proposition. But the theory misconceives the law as established. The legal obligation to accord recognition to a statutory representative of its employees, and particularly to give it an opportunity to discuss alternatives where an employer wishes to discharge them even for economic reasons, does not mean the employer must make economic concessions, or agree to any condition to its disadvantage. Of course there have been attempts at collective bargaining which have failed to yield mutually desirable results. As has been said too many times to warrant repetition, the results of collective bargaining are

not germane to the statutory requirements of the Act. From the Supreme Court language in *Fibreboard Paper Products, supra:* ". . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

I find that by ignoring the certified exclusive bargaining agent of its employees in deciding to discharge all its employees at the Greenpark Center location, and by refusing to bargain with the Union on request, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

In remedy, the Respondent must be ordered to bargain in good faith with the Union now on the subject of its decision to terminate the Greenpark Center operation, with its consequent discharge of the employees, as well as with respect to effects of such action. And to effectuate the purposes of the Act the Respondent must be ordered to make whole all the employees thus fired for monetary losses suffered as a result of the violation, from the date of their discharges until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on these subjects, pertaining to the decision to close the Greenpark Center and the effects of the closing upon the unit

employees; (2) a bona fide impasse in bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.

Conclusions of Law

1. First National Maintenance Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally closing its Greenpark Care Center operation and terminating its employees there without bargaining with the Union about the decision to discontinue the operation or about its effects upon the employees, the Respondent has refused to bargain and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[1]

---

1 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the

ORDER

The Respondent, First National Maintenance Corporation, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning the decision to discontinue its operations at the Greenpark Care Center, New York City, and its effects upon the employees there, with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

> All housekeeping employees employed at Greenpark Care Center, exclusive of all other employees, technical and professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive bargaining representative of all employees in the aforesaid bargaining unit with respect to its decision to discontinue the Greenpark Care Center, and with respect to the effects thereof upon the employees, and if an understanding is reached, embody such understanding in a signed agreement and offer reinstatement to the terminated employees.

---

findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Make whole all those employees of the Respondent who were discharged from that location on July 31, 1977, by the payment of backpay from the date of their termination to the date the Respondent bargains in good faith with the Union in accordance with the provisions provided above under the section entitled The Remedy.

(c) Mail copies of the attached notice marked Appendix[2] to all employees of the Respondent previously employed at the Greenpark Care Center.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 24, 1978

Thomas A. Ricci

Administrative Law Judge

---

2 In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix B

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5), 158(d)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

FILED
FEB 26 1981
ALEXANDER L. STEVAS
CLERK

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX FOR FIRST NATIONAL MAINTENANCE CORPORATION

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
PERRY S. HEIDECKER

MILMAN, NANESS & POLLACK
1175 West Broadway
Hewlett, New York 11557

Attorneys for Petitioner
First National Maintenance Corp.

Petition for Writ of Certiorari filed October 8, 1980
Certiorari granted January 12, 1981

TABLE OF CONTENTS

PAGE

Appendix A—Decisions and Order of the Court of Appeals for the Second Circuit..... 1

Appendix B—Pertinent Provisions of the National Labor Relations Act, as amended..... 21

BLS-A—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969) 22

BLS-B—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980) 42

APPENDIX A

Judgment of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-4167

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
Circuit Judges

HON. MORRIS E. LASKER,
District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FIRST NATIONAL MAINTENANCE CORP.,

Respondent.

A PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk

by

(Sgd.) ARTHUR HELLER,
Deputy Clerk

Opinion of the Court

NLRB v. FIRST NAT'L. MAINTENANCE CORP.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

v.

FIRST NATIONAL MAINTENANCE CORP.,

No. 79-4167, July 9, 1980

Application for enforcement of an NLRB order (242 NLRB No. 72). Enforcement granted.

William R. Stewart, Deputy Assistant General Counsel and L. Joseph Ferrara (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with them on brief), for petitioner.

Milman, Naness & Pollack (Sanford E. Pollack, of counsel), Hewlett, N.Y., for respondent.

Before TIMBERS and KEARSE, Circuit Judges, and LASKER, District Judge.*

Full Text of Opinion

LASKER. District Judge:—This case presents the issue whether an employer has the duty to bargain with the union representing its employees as to a decision to close part of its operations.

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

The National Labor Relations Board (NLRB or the Board) seeks enforcement of its order of May 23, 1979[1] which, based on the findings of the Administrative Law Judge that First National Maintenance Corporation (FNM) violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), by refusing to bargain with the union[2] representing certain of its employees, directs FNM to bargain with the union, to reinstate those employees, and to grant them back pay.

I.

FNM is in the business of providing cleaning and maintenance services to commercial customers. During the spring of 1977, FNM serviced between two and four nursing homes. The approximately 35 employees who staffed its operation at the Greenpark Care Center (Greenpark) chose the union as their representative on March 31, 1977 and the NLRB certified the union on May 11th. On July 12th, the union wrote to FNM requesting a meeting to negotiate a collective bargaining agreement. There is no evidence that FNM responded to that letter.

During the spring and summer of 1977, FNM determined that it was losing money at Greenpark, and discontinued its services there as of August 1st. It did not notify the union before taking this action. On July 28th, FNM informed its Greenpark employees that they would be discharged on July 31st.

The same day, the union's vice president, Edward Wecker, telephoned FNM's secretary-treasurer and one-third shareholder, Leonard Marsh, requesting that FNM "stay on" at Greenpark. Marsh answered that FNM could not continue its

---

1 The NLRB's order is at 242 NLRB No. 72, 101 LRRM 1177.

2 The Union elected and certified is District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

operations there because of financial reasons. When Wecker asked whether they could meet to discuss the situation, Marsh said, " 'We have nothing to discuss.' " The union and FNM had no further communications until the unfair labor practice charges were filed.

The NLRB found that FNM had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), and ordered FNM to bargain with the union upon request as to the decision to close its Greenpark operation; if the Greenpark services were resumed, to offer reinstatement to the discharged employees, and if no agreement to resume operation were reached, to bargain as to the effects of the closing and to establish preferential hiring for the terminated employees at its other operations. The order also awarded back pay to the discharged employees.

II.

FNM does not dispute that it had a duty to respond to the July 12th letter sent by the union requesting a meeting to negotiate a collective bargaining agreement, and the parties have stipulated as to FNM's duty to bargain as to the effects of the Greenpark closing. Consequently, the only issue before us relates to FNM's duty to bargain as to its decision to terminate its Greenpark services.

Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), together make it an unfair labor practice for an employer to refuse to bargain with the union "with respect to wages, hours and other terms and conditions of employment." See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964). The present issue, then, is whether the decision to close the Greenpark operation affected the employees' "terms and conditions of employment" within the meaning of the statute.

The seminal case on the subject is Fibreboard Paper Products Corp. v. NLRB, supra, 379 U.S. 203 (1964). There the Court held to be an unfair labor practice the employer's refusal to bargain as to the decision to contract out plant maintenance work formerly performed by its employees. Id. at 215.

The Court found that

> "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.' . . . A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."

Id. at 120 (citation omitted). The Court based its decision not only on the language of the statute but on the premise that requiring an employer to bargain in the circumstances would promote the purposes of the statute, that such a requirement was supported by industrial bargaining practices in the country, and that it "would not significantly abridge [the employer's] freedom to manage the business." Id. at 210-11, 213.

Accordingly, the Court held

> "that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

Id. at 215 (footnote omitted).

Although the decision in Fibreboard takes us part of the way, it does not fully determine the issue here: the obligation of an employer to bargain in the case of the closing of part of his facilities. Fibreboard was expressly limited to its facts, and they are distinguishable on the grounds that Fibreboard involved a less significant change in the employer's business. In Fibreboard, after the decision to contract out, the business continued to operate unchanged except for the use of the employees of the subcontractor for those of Fibreboard performing the same work under the same conditions. On the other hand, in a partial closing case, a portion of the employer's business—of course, how large a portion varies with each case—ceases to operate altogether.

Moreover, in Fibreboard, the Court did not specify how the three considerations which it noted—the statute's purpose, industrial practice, and the employer's entrepreneurial prerogative—related to the initial finding whether the statute literally applied. Consequently, it is unclear whether the duty to bargain imposed in Fibreboard derived solely from a finding that the case fell within the literal reach of the statutory language or whether some or all[3] of the additional considerations noted by the Court are necessary to the imposition of a duty to bargain.

The lack of clear direction provided by Fibreboard on this point is made even more difficult by the conflicting positions taken by the NLRB and most circuit courts that, since Fibreboard, have addressed the issue of the duty to bargain in the case of a proposed partial closing.

In Ozark Trailers, Inc., 161 NLRB 561 (1966), the NLRB held to be a subject of mandatory bargaining the decision to close one of the multiple truck manufacturing plants operated by the employer. The Board disagreed with the view espoused by two circuit courts, see NLRB v. Royal Plating & Polishing

---

3 This interpretation that all of the Fibreboard "factors" are a prerequisite to a duty to bargain is set forth in the discussion at 47 Geo. Wash. L. Rev. 679, 699 (1979).

Co., 350 F.2d 191 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), that the decision whether to impose a duty to bargain should depend on how "significant" or "major" is the change contemplated by the employer. The Board noted that a significant change in the employer's business is likely to be significant from the employees' perspective as well.

> "And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood."

The Board also found that the purpose of the statute—to promote industrial peace—would be served by finding that the employer had a duty to bargain, and that the subject was suited to bargaining because one of the reasons for the Ozark closing was the cost of labor. Finally, the Board noted that imposition of a duty to bargain would not sufficiently abridge the employer's freedom to conduct his business, since

> "an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accomodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision."

On the other hand, the circuit courts until recently have generally declined to impose a duty to bargain as to a partial closing when the decision to close was based on the employer's desire to effect a shift in capital or major change in its business, NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), or was due to severe economic loss or other considerations beyond the employer's control, Royal Typewriter Co. v. NLRB, 533 F.2d,

1030, 1039 (8th Cir. 1976) (dicta); NLRB v. Thompson Transport Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). But see NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 517 (5th Cir.), cert. denied, 385 U.S. 935 (1966); NLRB v. American Manufacturing Co., 351 F.2d 74, 80 (5th Cir. 1965).[4]

Recently, in an opinion that exhaustively discussed the relevant legal precedent and policy considerations, the Third Circuit treated the question whether bargaining was mandatory as to a partial closing.[5] In Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-35 (3rd Cir. 1978), the court rejected a per se rule in favor of "an initial presumption, founded on statutory purposes and language, that a partial closing is a mandatory subject of bargaining," followed by an examination of the facts of each case and balancing the parties' interests in compelling bargaining or not.

On the one hand "[o]f chief concern to the employees is the prospect of losing their jobs. It is in fact difficult to imagine any result of a decision by the employer about which labor

---

4 In NLRB v. Rapid Bindery, Inc. 293 F.2d 170, 176, (2d Cir. 1961), the Second Circuit held that the decision to transfer work from one plant to another and to close the first plant

> "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made, 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

This decision does not compel a result contrary to that reached here since it pre-dates Fibreboard, in which, as indicated, the decision to contract out work which resulted in the layoff of employees was held to be a mandatory subject of bargaining.

5 A provocative treatment of Brockway may be found in Comment, *Duty To Bargain About Termination of Operations:* Brockway Motor Trucks v. NLRB, 92 Harv. L. Rev. 768 (1979).

would be more highly sensitized." Id. at 735 (footnote omitted). Accordingly, a union would naturally seek to bargain with the employer to attempt to find a way to avoid closing the facility. On the other hand, the interest of the employer in not bargaining asserted in Brockway was its "freedom to determine the company's direction" unhindered. Id at 738.

Although the court found no evidence in the record—such as severe economic difficulties or action of a third party which would render bargaining futile—suggesting that imposition of a duty to bargain would interfere with that freedom, id. at 738-39, it refused to enforce the Board's order because the record was unclear as to the precise nature of the employer's interest in not bargaining. Id. at 740.

III.

It may be argued that a per se rule, although rejected in Brockway, 582 F.2d at 731-34, should be adopted: either imposing a duty to bargain whenever an employer closes part of its business (although the NLRB does urge this position), or absolving the employer of a duty to bargain whenever the decision to close is based on economic considerations (which is FNM's position). Yet we agree with the Third Circuit that a per se rule is inappropriate in an area whose parameters are not clearly defined by the statute or by Supreme Court precedent.

Although the rationale of Fibreboard is not altogether clear, we believe that the decision at least supports the rejection of a per se rule imposing a duty to bargain, since such a rigid approach would ignore additional relevant considerations such as the three mentioned by the Court. Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction. In rejecting the contention that the employer should not have to bargain because its decision was based on economic considerations, the Court stated:

> "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is

> founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

379 U.S. at 214; see Brockway, supra, 582 F.2d at 739.

We also agree with the Brockway court that the correct aproach is to establish a presumption that a duty to bargain exists. A partial closing[6] affects "terms and conditions of employment" at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute. Equally important is the fact that it is the employer who has access to the facts surrounding the decision to close, and consequently is in a position to justify its making that decision without first bargaining over it.

However, we disagree with Brockway that a determinative factor should be a balancing of the respective interests of the employer and employees in bargaining. We believe that the

---

6 In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court held that

> "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."

Id. at 273-74 (footnote omitted). The Court distinguished a "partial" closing, however, and held that

> "a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

Id. at 275. That case did not involve the question whether the employer's decision constituted a mandatory subject of bargaining, as the Court noted that

> "no argument is made that 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. Fibreboard Paper Products Corp. v. Labor Board, 379 U.S. 203."

Id. at 267 n.5.

Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case.

determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations of whether the purposes of the statute are furthered by the decision to impose a duty to bargain in a particular case.

Accordingly, the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain. Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration. The employer might overcome the presumption by demonstrating that bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer's decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off was small and the number of the remainder was large.[7]

---

7 The dissent maintains that despite our purported rejection of a per se rule favoring the imposition of the duty to bargain, in effect one has been adopted. This is not so because, as discussed in the text above, our ruling would exclude the imposition of a duty to bargain on a showing that the purposes of the statute would not be furthered by mandating in a particular case. We have suggested several examples of situations in which such a showing might be made.

IV.

Turning to the present case, the decision to close the Greenpark operation clearly falls within the literal language of the statute. That decision terminated the employment of FNM's 35 employees, there, and, as the Supreme Court has said, the words "terms and conditions of employment" do "plainly cover termination of employment." Fibreboard, supra, at 210.

FNM has offered no evidence to rebut the presumption arising from the literal application of the statute, but merely asserts that it was losing money on Greenpark. However, as discussed above, although certain considerations generally relating to economics may render bargaining futile and therefore nonobligatory, FNM has not shown that to be true of the considerations it claims prompted its decision to terminate the Greenpark operation.[8]

The dissent, noting that, as the Administrative Law Judge found, the company was losing money at Greenpark, argues that FNM was not required to bargain over the decision to terminate the Greenpark operation because those losses were not attributable to labor costs, since under the contract between Greenpark and FNM Greenpark paid FNM's employees' salaries and fringe benefits, plus a management fee. We believe, however, that the critical question is whether the purposes of the statute are advanced by imposition of a duty to bargain and that that determination does not depend solely on whether the costs precipitating the decision to terminate were not labor originated. What appears to us to be the decisive factor, is whether, regardless of the origin of the cost which

---

8 The dissent, relying on Justice Stewart's concurrence in Fibreboard, concludes that FNM's decision was "a matter of fundamental entrepreneurial discretion." Although we have indicated our agreement that certain decisions may be within managerial prerogative and not subject to mandatory bargaining, the appropriate analysis to determine whether such a decision is involved in the case at hand is to inquire whether the imposition of a duty to bargain would further the purposes of the statute.

precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision. On the record here, for example, there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. Moreover, the dissent appears to us to be unsound in placing emphasis on the question whether the company's difficulties are attributable to non-labor costs alone. As we see it, such difficulties are the product of the company's entire history and arise from the sum of the costs involved in running a business.

Accordingly, we find that FNM had a duty to bargain with the union as to its decision to close the Greenpark operation.[9]

FNM argues that it nevertheless did bargain with the union on July 28th and 29th, and therefore satisfied its duty to bargain as to its decision to close its Greenpark services.

However, the telephone conversations, initiated by the union, consisted of little more than Marsh informing Wecker that FNM was "pulling out" of Greenpark for financial reasons and that there was "nothing to discuss."[10] It is difficult to

---

9 In Brockway, the court declined to enforce the NLRB order and remanded because of the insufficient factual record to enable it to balance the employer's interest in not bargaining. 582 F.2d at 739-40. That course is unnecessary here. Neither party has claimed, and we do not find, that the record is insufficient to permit determination of the question before us. See Electrical Products Division of Midland-Ross Corp. v. NLRB, No. 78-2556, Slip op. at 8-9, 103 LRRM 2908 (3d Cir. March 18, 1980).

10 Marsh stated during the telephone conversation that if FNM stayed at Greenpark one day, it was then bound to stay for a full 30 days. There was also some discussion concerning the possibility of persuading Greenpark to waive the 30-day contractual provision.

conceive of conduct which more clearly constitutes a failure of good faith bargaining to an impasse.

V.

FNM argues that the Board abused its power by ordering FNM to reinstate the terminated employees and awarding them backpay. The Board answers that FNM failed to except to the remedy before the Board and is therefore precluded from objecting to it here.

A condition to the right to object to the enforcement of remedy ordered by the NLRB is that the party opposing must have excepted to the remedial portion of the order before the NLRB. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); National Labor Relations Act 10(e), 29 U.S.C. 160(e).

FNM contends that its exceptions to the ALJ's decision and its accompanying brief objected to the remedial portion of the order. This is simply not supported by the documents[11] themselves which do not mention the remedy ordered.

FNM next argues that the General Counsel's cross-exceptions to the decision questioned the relief ordered and "fully bring the question of remedial relief before the Board within the meaning of Section 10(e)." However, the Board's exceptions did not object to the remedy ordered. Rather they request further relief in addition to that ordered. The General Counsel's exceptions could not have the effect of notifying the NLRB that FNM "intend[ed] to press the specific issue it now

---

11 The exceptions to the ALJ's decision were:

"1. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent was under a duty to bargain with the Union over the decision to terminate the contract with Greenpark Care Center. . . ."

"2. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent failed to bargain with the Union over the effects of its decision to close the operation. . . ."

raises." NLRB v. Seven-Up Bottling Co., supra, 344 U.S. at 350.

The petition for enforcement is granted.

Concurring and Dissenting Opinion

KEARSE, Circuit Judge, concurring in part and dissenting in part:—I must respectfully dissent from so much of the majority's decision as holds that respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(5), 158(a)(1) by refusing to bargain over its decision to close its Greenpark operation, and I would therefore deny enforcement of so much of the NLRB's order as directs respondent to pay backpay to the employees terminated.

I

There is no question that respondent failed to bargain with the union, nor any question that it was required to bargain over the effects of its decision to terminate its operations at Greenpark Care Center ("Greenpark"). See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961); Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965). To this extent I would affirm the Board's findings that respondent violated the Act.

I cannot agree, however, that respondent violated the Act by refusing to bargain over the decision to terminate. The decision to end services at Greenpark was made in order to stop losing money. This is not a case in which, as the majority states, the respondent "merely asserts" that it was losing money on the Greenpark operation. The record indicated that during the spring of 1977 respondent had repeatedly sought an increase in its fee in order to enable it to continue services at Greenpark, stressing to Greenpark's management that respondent was

losing money. The Administrative Law Judge ("ALJ") found this assertion to be true: *"It is a fact the Respondent was losing money on this job."* (Emphasis added.)

Further, in the present case the contract between respondent and Greenpark required Greenpark, in addition to paying a set management fee, to pay respondent's "gross weekly payroll and fringe benefits" for that facility. It was the amount of the management fee, over and above the labor costs, on which respondent and Greenpark could not agree. Thus, the facts are that respondent was losing money on the Greenpark job, that its losses were not due to labor costs,[1] and that its solution for these losses was to close down the losing operation.

I do not believe that the carefully limited decision in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), or any other authority, requires the respondent to bargain over its decision to terminate Greenpark in order to halt these losses.[2]

---

1 This distinguishes such cases as Ozark Trailers, Inc., 161 NLRB 561 (1966) in which the company's actions were prompted in large part because of the cost of labor. Even in a case where a partial closing is due to labor costs, it may be that a labor union's legitimate interests are adequately protected by the employer's duty to bargain over the effects of the closing, as distinguished from the decision itself to close. There is no need to reach that question here.

2 The majority states that, like the Third Circuit in Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), it recognizes merely a presumption, and not a per se rule, that there is a duty to bargain over a partial closing. Looking at the results of the two cases, however, it appears to me that the majority comes rather near to imposing that per se rule. In Brockway, the parties had stipulated that the partial closing was based on "economic considerations." The nature of these considerations was not disclosed in the record, and thus it could not be known whether or not that respondent had actually been losing money on the closed operation. In those circumstances the presumptive duty to bargain was not adequately rebutted. Yet the Brockway court did not grant enforcement, but denied the Board's petition without prejudice. In the present case, the established facts are considerably less compelling from the Board's point of view. There is a record on which the ALJ expressly found that in fact respondent was losing money; and the record shows that those losses were not due to labor cost. Yet here, the majority promptly grants enforcement.

See Morrison Cafeterias Consol. Inc. v. NLRB, supra. In Fibreboard the Supreme Court ruled that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" violated the requirement of § 8(d) of the Act that an employer bargain about "conditions of employment." Id. at 215. Unlike the present case, Fibreboard involved the replacement of employees in an ongoing operation. (And unlike the present case the costs sought to be shaved in Fibreboard were labor costs.) The opinions in Fibreboard are instructive in distinguishing its "contracting out" situation from that of the present case.[3] Thus, the majority opinion observed as follows:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.
>
> The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . .

---

3 Far from deciding such questions as a decision to terminate an operation altogether, Fibreboard did not purport to reach even "other forms of 'contracting out' or 'subcontracting.' " Id. at 215.

Id. at 213-14. Justice Stewart's concurring opinion stresses that certain managerial decisions, such as the decision to close a business, which obviously will affect employment, do not implicate "conditions of employment" within the meaning of § 8(d):

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. at 223.

I conclude that the respondent's decision in this case to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not "suitable for resolution within the collective bargaining framework."

II

Respondent has challenged in this Court both the order directing it to reinstate terminated employees and the backpay award. The Board argues that these questions are not properly before the Court because respondent's letter of exceptions to the ALJ's decision was "silent on remedy and too general in form to have placed the Board on notice that the Company objected to the remedy in the event its position did not prevail." (Board brief at 21.) This position has some merit with

respect to the Board's direction that respondent offer to reinstate terminated employees in comparable positions in other facilities served by respondent; that order was properly based on respondent's failure to bargain over the effects of its termination decision, and I would agree that respondent is barred from attacking that portion of the remedy.

Nevertheless, I would not hold the respondent barred from challenging the backpay award, because that award is based on the determination that the company violated the Act by failing to bargain over the termination decision itself. Since I find this premise faulty, I find no basis for the backpay award and would deny enforcement of that portion of the Board's order. NLRB v. Rapid Bindery Inc., supra, 293 F.2d at 177.

APPENDIX B

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5), 158(d)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage of discourage membership in any labor organization. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

BLS-A—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969)

Chapter II. Plant Movement

Prevalence

Of the 1,823 agreements examined, 21.5 percent had clauses limiting plant movement as defined for purposes of this study (table 1). These provisions covered 2.9 million workers or slightly more than 38 percent of the total. Although manufacturing industries accounted for three-fifths of all agreements, only 25 percent included plant movement provisions. In nonmanufacturing, almost 17 percent of the agreements had plant movement provisions.

Plant movement provisions were found in 20 or more agreements in each of seven industries. Only two of these industries had a significantly higher frequency of provisions than the all industries prevalence of 21.5 percent—the apparel industry, where 43 of 55 agreements or 78.2 percent had these provisions, and the transportation industry which had 49 of 91 agreements or 54 percent.

Provisions that specify the protections available to employees when the location of an establishment has been changed represent a collective bargaining response to changes that are occurring within almost all industries. Apparel, for example, has been establishing new facilities rather than renovating old plants when instituting new production methods. Since the new facilities are frequently located outside the usual garment districts, the union and workers consider themselves plagued by runaway plants. To counteract this movement, the Ladies' Garment Worker's Union (ILGWU), long a dominant force in policing and stabilizing the industry, has negotiated contract provisions limiting the production area in an effort to retain its jurisdiction and to preserve job opportunities for its members. In the case of trucking, there has been a trend toward merger

into larger firms and hence, more extensive and efficient terminals. The Teamsters have negotiated provisions safeguarding the status of workers transferred as a result of consolidations of existing terminals and the opening of new ones. In contrast, contracts in the apparel industry were designed to limit plant movement itself.

Nine major unions accounted for over two-thirds of the agreements having plant movement provisions. Approximately one-third (271) of all major agreements negotiated by the nine unions included plant movement provisions as compared to a total prevalence of one-fifth for all the agreements in the study. These 271 contracts covered 2.3 million workers or 79 percent of the 2.9 million workers covered by agreements having plant movement clauses, considerably more than their proportionate representation (49 percent) of the workers under all major agreements.

	Total studied		Agreements having plant movement limitatinons	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)
Total, all unions.....	1,823	7,339.2	392	2,873.1
Total, nine unions	764	3,654.9	271	2,277.3
Autoworkers.....	118	995.2	39	738.2
Clothing workers.....	19	165.3	12	143.3
Electrical workers (IBEW)..	110	295.8	16	29.0
Garment workers (ILGWU).	42	257.0	36	242.8
Machinists.....	89	285.7	16	76.0
Meat cutters	50	142.8	19	66.7
Retail clerks	48	137.0	18	64.0
Steelworkers.....	120	587.8	42	430.7
Teamsters	168	748.4	73	486.6
Other.....	1,059	3,724.3	121	595.8

NOTE: Because of rounding, sums of individual items may not equal totals.

Among the nine unions were the Autoworkers, whose 39 plant movement provisions out of 118 agreements (33 percent) represented 74 percent of the workers covered by those agreements, and the Steelworkers, whose 42 out of 120 agreements (35 percent) represented 73 percent of their covered workers.

When the agreements were divided into groups according to size of bargaining unit, the proportion of agreements having plant movement provisions increased with the size of the bargaining unit. In the first two size groups, the proportion of agreements and workers were approximately the same. In the largest size group, however, the proportion of workers greatly exceeded that of agreements.

Limitations on Plant Movement

In the main, the purposes of clauses limiting plant movement is to safeguard the employment status of workers covered by the contract. However, there also are provisions which protect the union's jurisdiction in cases where companies merge, plants relocate, or new additions are built. Six industries, each having over 30 clauses, accounted for three-fifths of all provisions permitting plant movement subject to restrictions (table 1).

These included the two industries previously cited as generally having major clusters: Apparel, with 43 agreements; and transportation, with 49 agreements. Four additional industries were: (1) Transportation equipment (38); (2) food (38), especially meat products, where obsolete plants continue to be replaced by modern facilities, and dairy products where the number of plants is declining while plant size is increasing; (3) primary metals (32), were plant and equipment expenditures in recent years have been spent largely for the replacement and modernization of facilities; and (4) retail trade (35), where additional stores continue to be built, and either union or contract jurisdiction frequently is extended to the new facility.

Agreements	Size of bargaining unit							
	Total, all units		1,000-4,999 workers		5,000-9,999 workers		10,000 workers and over	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Total.....	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Includes provisions.	29.7	45.2	27.3	28.6	39.0	39.2	44.9	62.0
Without provisions.	70.3	54.8	72.7	71.4	61.0	60.8	55.1	38.0

Management Rights[3]

Employers have traditionally maintained that some functions which they consider essential to efficient plant operation are not negotiable. Virtually all agreements include "management rights" or "management prerogative" clauses which frequently enumerate functions to be exercised solely by the employer, but these may be modified in other sections of the agreements, as in most of the 392 discussed earlier. In 150 (8 percent) of the agreements examined for this report, management retained the right to move or relocate a plant unrestricted by any other provision in the agreement. There was a higher proportion of these clauses in manufacturing than in nonmanufacturing agreements, with concentrations in primary metals, electrical and nonelectrical machinery, and transportation equipment.

Generally, the reservation of the right to move a plant amplified management prerogatives. The contract language emphasized the fact that the parties had agreed that this function was one that only the employer could exercise:

> (1) Without intending by the language of this section to limit the functions and prerogatives of management or to define all of such functions and prerogatives, it is agreed that the following are the exclusive functions of the employers . . . the right to decide the number and location of its plants, the creation of new departments and the elimination of existing departments in a plant . . .
>
> (2) The union recognizes other rights and responsibilities belonging solely to the company, prominent among which is the right to decide the number and location of plants . . .

---

3 A discussion of this subject also is included in *Major Collective Bargaining Agreements, Management Rights and Union-Management Cooperation* BLS Bulletin 1425-5, pp. 15-16.

(3) It shall be the sole right of the company to diminish operations in whole or part or to remove a plant for operation or business of same or any part thereof, to any location as circumstances may require.

Notice and Participation Provisions

Slightly more than 30 percent of the agreements having these provisions stipulated that the union would be notified or would participate in a management decision to move a plant. Notice and participation provisions represent a fundamental safeguard for both union and employer. In the event of a plant shutdown or move, the union is afforded an early opportunity to prepare for the effects of these decisions on workers. In designing negotiation and participation clauses, the parties have followed the example of similar provisions in the field of subcontracting.[4] This is not unexpected, since both plant movement and subcontracting issues, as well as many others, concern basic job security.

The clauses examined were divided equally into two groups: Those which specifically provided for notice of, or consultation about, plant movement decisions (60 agreements); and those which specifically involved the impact that these decisions might have upon the work force (59 agreements).

Among the 60 agreeements dealing with the decision to move, 46 provided only that advance notice of plant movement would be given. (See above tabulation.) Two additional agreements combined advance notice with other forms of union participation in the decision. Advance notice clauses were typically worded as follows:

(4) It is agreed that the employer will give the union one week's written notice of his intention to cease operations, or to sell, transfer, or otherwise dispose of the business.

---

4 See *Major Collective Bargaining Agreements, Subcontracting* BLS Bulletin 1425-8.

Industry	Total		Requirement applies to—			
			Decision to close or relocate plant		Effects of shutdown or relocation	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers in thousands)
All industries	119	939.7	60	408.2	59	531.5
Manufacturing	104	895.4	52	392.3	52	503.1
Food and kindred products	16	68.1	15	65.8	1	2.3
Apparel and other finished products	18	196.4	16	186.4	2	10.0
Primary metals	24	362.4	—	—	24	362.4
Other manufacturing	46	268.6	21	40.3	25	128.3
Nonmanufacturing	15	44.3	8	15.9	7	28.4

[1]Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

Industry	Total		Consultation, discussion or bargaining		Periodic review	
	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers in thousands)
All industries	59	531.5	35	282.6	24	248.8
Manufacturing	52	503.1	28	254.2	24	248.8
Nonmanufacturing	7	28.4	7	28.4	—	—

[1]Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

(5) . . . Further the company agrees to notify the union sixty days before it closes a plant on a unit thereof which would result in the permanent layoff of the majority of the employees in that plant or unit.

(6) Employer will not, without reasonable notice to the union, remove or cause to be removed from Andalusia, Alabama, its present plant or plants in Andalusia, Alabama.

To some extent, the prevalence of advance notice of movement decisions is understated. That is, it is implicit that agreements (59) providing for negotiation concerning the impact of the decision must necessarily provide advance notice of the decision. In some clauses, this relationship is stated in the following manner:

(7) It is understood and agreed that the company reserves the right to expand, limit, or curtail its operations, or to close down completely when the company considers it advisable to do so. In the event of any such change of major proportion, the union will be notified at once, and at the request of the union the company will meet with the union bargaining committee to consider the seniority provisions of this agreement.

(8) The company agrees to advise [the union] promptly of any plans for a major transfer of operations into or out of its [plants] and to institute negotiations with you promptly for the purpose of consummating an agreement with respect to the move as it may affect [plant] and other employees of the company.

(9) The company will give the union at the division level a 60-day notice of its intentions to transfer and consolidate two or more area headquarters offices. The parties shall meet at the division level for the purpose of effectuating the provisions of this agreement and negotiating on matters not covered by the contract or this agreement. . . .

By the same token, it is implied that clauses providing for easing the impact of a decision to close or move a plant also must provide prior notice, although this may not be stated in the agreement.

The 14 agreements involving the decision to move assigned a more active role to the union than did those providing for notice only. Three of these required a discussion between the union and the employer.

> (10) . . . The company's right to go out of business; to abandon territory; and to abandon the processing and packaging of a product withdrawn from distribution shall not be impaired. . . . However, such rights shall not be exercised until a conference is held with the union to discuss the necessity for such action.

The remaining 11 agreements, 10 in the apparel industry and 1 in leather products, required the consent of the union prior to an employer's relocating the plant or constructing additional facilities. The third illustration requires arbitration if the union withholds its consent to the move:

> (11) The employers shall not remove their shops from the city where they are presently located, without the consent of the union.
>
> (12) No member of the association shall move his inside shop from the premises where his shipping facilities, showroom and/or cutting department are located, without the consent of the union, nor shall any member of the association move his cutting department or his entire business to any point outside of the Boroughs of Bronx, Brooklyn, Manhattan, Queens and Richmond.
>
> (13) In order to protect the regularity of employment of the workers employed by the respective members of the association, it is agreed that should a member of

> the association, during the term of this agreeement, desire to establish or maintain an additional shop or factory or add any other facilities for the manufacture of work in operations covered by this agreement, in place or places other than its regular shop or factory, it shall first notify the union in writing of its intention and no such additional facilities shall be added unless it first secures the written consent of the union. In the event that the union shall fail to give such consent, the matter shall be deemed a dispute and shall be submitted to the impartial chairman for final determination in the same manner as any other dispute herein.

Many collective bargaining agreements include measures designed to soften the impact of plant shutdown or relocation on the workers. Subsequent sections of this bulletin discuss related issues such as interplant transfers and relocation allowances. Bulletin 1425-2 dealt with severance pay and layoff benefit plans whereas other bulletins in this series described training and retraining and subcontracting provisions.[5] In the present study, however, 59 agreements were found that provided for union management negotiation or other administrative participation by the union intended to ease the impact of the planned shutdown or movement.

Twenty agreements in the primary metals industry together with two each in the fabricated metal products and transportation equipment industries provided for a periodic review of contract clauses pertaining to shutdown or movement:

> (14) The operation of this section [pertaining to plant closings, interplant transfer, relocation allowances, etc.] will be subject to periodic review by a joint committee, consisting of equal numbers of representatives of both parties (not more than three each), who shall meet periodically to review the operation of this section and to consider and resolve any

5 See *Major Collective Bargaining Agreements, Training and Retraining*, BLS Bulletin 1425-7 and *Subcontracting* 1425-8.

Industry	Total		Notice only		Consultation, discussion, or bargaining		Union approval or joint agreement	
	Agreements	Workers (in thousands)	Aggrees ments	Workers (in thousands)	Agreements	Workers (in thousands)	Agreements	Workers (in thousands)
All industries....	60	408.2	46	218.9	3	4.8	11	184.5
Manufacturing	52	392.3	38	203.0	3	4.8	11	184.5
Nonmanufacturing.	8	15.9	8	15.9	—	—	—	—

[1]Excludes railroad and airline industries.
NOTE: Because of rounding, sums of individual items may not equal totals.

problems that may arise from its operations. The company shall supply to such committee pertinent information relating to the operation of this section.

The remaining provisions stipulated that the union would be consulted or that methods to ease the impact of the decision would be subject to discussion or negotiation. The issues to be discussed were not set forth, probably because the exact nature of the problems could not be anticipated:

(15) In the event of transfer of operations from one plant to another or shutdown of a plant causing permanent lay-offs, the company agrees to discuss the matter with the international union as soon as reasonably possible after the necessity of such transfer or shutdown has been determined, in an effort to work out the problem on a reasonable basis.

In other cases, however, negotiators have agreed on specific procedures in which to ease the impact, as reflected in clauses concerning transfers, preferential hiring, and moving allowances:

(16) The company also agrees that in the event a decision is made to completely and permanently discontinue either the foundry section or the machine shop section of Milwaukee Works, the union is reserving the right to re-open negotiations with respect to the transfer of employees from the discontinued section to the surviving section.

(17) If one of the plants covered by this agreement were closed, or if an entire department of that plant were closed and the operations involved were then moved to some other plant operated by the company, the company would negotiate with the union upon its request to determine whether or not an equitable plan could be devised to give the employees who had performed the operations that were moved a preference to employment at the plant to which the opera-

tions were moved, and to transfer the employees' seniority to such new plant. . . .

(18) In the event that the company shall close any of its Muskegon plants, or portions thereof, and move them to new plants outside the Muskegon area, the company agrees that it will notify the union as to the locations of such plants, the number of shop employees and skills required to operate such new plants, and employees within such numbers and having the required skills will be permitted to move to the new plant locations and carry with them the seniority which they have at the time of the closing of the Muskegon plants. The company will notify the union if it is necessary to employ people out of line of seniority to place such new plants in productive operations.

The company and the union will then review the number of persons and classifications so presented to the union by the company. This review will cover the number of persons losing their employment because of such plant closings and the work classification and experience of such persons.

The company will also meet with the union with reference to allowances for moving expenses, if any, for the employees displaced by the plant closings, and whom the company and the union agree are qualified to perform the work available at the new locations.

Other agreements (20) dealing with the impact of plant movement or shutdown decisions provided for advance notice. Advance notice provisions, either by themselves or in combination with other forms of participation, were found in 68 of the 119 union participation agreements. Advance notice could be sent to the union, posted on plant bulletin boards, or sent directly to the employees concerned. In some cases, more than one notice might be required; first, a general notice of future

plant closing, and then a specific notice of layoff, as in the following:

> (19) Whenever the company decides to close a plant, the company shall give notice of its decision to the employees concerned and to their representatives if any. Thereafter, as the company, in the course of such plant closing, no longer has need for the work then being done by any employee, his employment by the company may be terminated, subject only to compliance with the provisions of this section.
>
> Each employee shall be given at least one week's advance notice of the specific date of his termination.

Of the agreements providing for advance notice of moves, about one-third were not specific as to a time period, requiring only that advance notice be given. The decision not to set forth precise time limits indicates that the parties did not consider a minimum advance notice time necessary, as the decision would be announced as soon as plans were final. In any event, preparations for a plant move would constitute a form of notice. Accordingly, the indefinite notice provision allows flexibility, and at the same time expresses the good faith intent of the employer to notify the union and workers of its decision:

> (20) . . . Should the company, due to economic or other reasons, decide to discontinue any operations or portions of an operation it will notify the union in advance.
>
> (21) Should the employer desire to expand and open additional factories, notice thereof shall be given by said employer to the union prior to the opening of such factories and an agreement shall be negotiated affecting such factories.
>
> (22) The company shall notify the international union in advance of any plant closing. . . .

The remaining agreements stated the length of advance notice to be given. Time periods ranged from as little as 1 week—the equivalent of a layoff notice—to as much as 6 months in one agreement. The only noticeable clusters appeared at 1 month and at 90 days, the latter largely in meatpacking.

In terms of planning for plant movement, i.e., for negotiating and making adjustments to provide workers with some degree of protection, even a 1-month period puts urgent time pressure on management and union negotiators. It could be reasonably assumed that stipulated time limits are minimums, and the decision to move will be made known far in advance. The employer's argument for not giving more extended notice usually is based on the premise that workers will leave for other jobs before production ceases.

Period	Agreements	Workers (in thousands)
Total	68	333.4
Less than 3 months	25	144.2
More than 3, less than 6 months	21	106.1
6 months to 1 year	1	1.3
Unspecified	21	81.8

Occasionally, advance notice provisions will permit a waiver of the time limit, as in the following clause, when circumstances beyond management's control preclude meeting the notification requirement:

> (23) The council member will notify the union two (2) weeks in advance of the actual closing of a store, unless the closing is caused by circumstances beyond the council member's control.

To assure the safe transmittal of notice, at least one agreement specified that the notice had to be written and sent by either registered or certified mail:

> (24) The employer shall give the unions three weeks' prior written registered or certified notice of its intention to close permanently any store.

Although agreements that provided for union participation were equally divided between clauses involving a decision to move and those dealing with the impact of the move, some important differences showed up at the industry level. Industries that are characterized by a high degree of worker mobility or a relatively large number of small establishments tend to have clauses relating to the decision to move, as in retail food stores or in the apparel industry. In industries having fewer establishments and less mobility, such as primary metals, union participation clauses are more apt to deal with the impact of plant movement or shutdown (see tabulation, page 4).

TABLE 1 Plant Movement in Major Collective Bargaining Agreements, by Industry, 1966-67

Workers in thousands

Industry	Total agreements studied		Movement permitted subject to limitation, perquisites or obligations with regard to old plant, new plant or both		No explicit limitations, perquisites, or obligations					
					Total		Expressed in management rights clause only		No reference	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
All industries	1,823	7,339.2	392	2,873.0	1,431	4,466.2	150	445.8	1,281	4,020.5
Manufacturing	1,048	4,155.5	263	2,091.9	785	2,063.6	139	398.8	646	1,664.8
Ordnance and accesories	18	69.9	5	27.2	13	42.7	5	25.1	8	17.6
Food and kindred products	126	382.0	38	131.8	88	250.3	9	15.5	79	234.9
Tobacco manufactures	11	24.2	1	1.1	10	23.1	2	3.3	8	19.8
Textile mill products	30	71.8	6	23.1	24	48.8	8	14.0	16	34.9
Apparel and other finished products	55	392.0	43	360.5	12	31.6	—	—	12	31.6
Lumber and wood products except furniture	13	24.6	1	2.0	12	22.6	2	3.4	10	19.2
Furniture and fixtures	18	29.6	2	3.0	16	26.6	3	3.4	13	23.2
Paper and allied products	50	112.2	7	12.2	43	100.0	4	5.7	39	94.3

Industry	Total agreements studied		Movement permitted subject to limitation, perquisites or obligations with regard to old plant, new plant or both		No explicit limitations, perquisites, or obligations					
					Total		Expressed in management rights clause only		No reference	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Printing, publishing and allied industries	28	59.1	2	11.6	26	47.5	1	1.2	25	46.3
Chemicals and allied products	61	106.8	6	12.0	55	94.8	10	18.5	45	76.4
Petroleum refining and related industries	20	44.9	3	9.8	17	35.1	1	1.0	16	34.1
Rubber and miscellaneous plastics products	21	107.6	5	10.9	16	96.7	1	5.7	15	91.0
Leather and leather products	23	73.8	10	51.2	13	22.6	2	4.5	11	18.1
Stone, clay, and glass products	37	115.5	7	53.2	30	62.3	5	9.0	25	53.3
Primary metal industries	106	545.7	32	384.0	74	161.8	13	24.3	61	137.5
Fabricated metal products	55	129.9	15	56.6	40	73.3	9	13.3	31	60.1
Machinery, except electrical	115	314.6	20	73.5	95	241.1	19	70.7	76	170.5

Electrical machinery, equipment, and supplies	106	398.7	13	104.2	93	294.5	18	79.1	75	215.4
Transportation equipment	118	1,075.5	38	739.2	80	336.3	25	98.8	55	237.5
Instruments and related products	25	48.6	5	9.0	20	39.7	2	2.6	18	37.1
Miscellaneous manufacturing	12	28.9	4	16.1	8	12.8	—	—	8	12.8
Nonmanufacturing	775	3,183.8	129	781.2	646	2,402.6	11	47.0	635	2,355.7
Mining, crude petroleum, and natural gas production	16	111.4	6	88.6	10	22.8	2	2.5	8	20.3
Transportation [1]	91	607.0	49	444.2	42	162.8	—	—	42	162.8
Communications	88	524.9	3	24.5	85	500.4	1	9.2	84	491.3
Utilities: Electric and gas	80	180.0	13	24.0	67	156.0	3	6.6	64	149.4
Wholesale trade	19	35.3	9	18.3	10	17.0	—	—	10	17.0
Retail trade	119	317.6	35	107.4	84	210.3	1	2.5	83	207.9
Hotels and restaurants	37	171.5	7	31.8	30	139.7	—	—	30	139.7
Services	65	258.2	6	25.6	59	232.6	4	26.2	55	206.4
Construction	256	970.9	1	17.0	255	953.9	—	—	255	953.9
Miscellaneous nonmanufacturing	4	7.2	—	—	4	7.2	—	—	4	7.2

[1] Excludes railroad and airline industries.

NOTE: Because of rounding, sums of individual items may not equal totals.

BLS-B—Relevant Excerpts from U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980)

TABLE 7.6 Advance notice provisions by industry

(Agreements covering 1,000 workers or more, January 1, 1978)

Industry	All agreements		Requiring advance notice							
			Total		Layoff		Plant shutdown or relocation		Technological change	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
All industries	1,536	7,054,550	795	4,041,250	669	3,346,100	160	710,800	171	1,221,350
Manufacturing	770	3,377,150	506	2,310,850	435	1,928,600	113	459,950	87	722,050
Food, kindred products	84	234,550	51	116,850	40	80,100	17	47,200	9	25,850
Tobacco manufacturing	9	23,850	9	23,850	6	17,500	6	12,650	1	1,200
Textile mill products	13	28,900	7	18,600	2	2,700	—	—	5	15,900
Apparel	44	371,550	11	107,900	2	6,500	5	12,700	6	97,900
Lumber, wood products	11	18,900	3	6,500	3	6,500	1	2,300	—	—
Furniture, fixtures	12	20,050	6	7,800	5	6,600	1	1,200	—	—
Paper, allied products	49	86,600	27	52,150	12	28,650	9	14,300	13	22,250
Printing and publishing	23	48,400	22	46,200	18	40,600	6	8,050	16	35,450
Chemicals	41	78,400	29	52,450	27	48,050	1	1,050	6	12,850
Petroleum refining	16	30,150	11	21,250	10	18,750	5	8,850	1	1,700
Rubber and plastics	19	95,750	14	57,100	12	31,450	4	36,900	1	24,000
Leather products	12	25,050	5	9,800	3	6,300	2	3,500	1	1,000
Stone, clay, and glass	31	92,600	26	84,250	22	74,450	14	49,100	8	21,200
Primary metals	74	421,550	35	158,750	31	97,500	7	75,650	—	—
Fabricated metals	43	99,850	33	84,750	30	77,450	7	13,700	—	—

Industry	All agreements		Requiring advance notice							
			Total		Layoff		Plant shutdown or relocation		Technological change	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
Machinery	80	251,500	70	228,900	70	228,900	11	47,250	7	12,550
Electrical machinery	77	361,300	58	300,150	56	228,350	8	96,900	1	9,000
Transportation equipment	107	1,034,700	72	896,600	70	894,150	6	22,100	10	438,300
Instruments	13	30,700	12	29,600	11	26,700	3	6,550	1	1,100
Miscellaneous manufacturing	12	22,800	5	7,400	5	7,400	—	—	1	1,800
Nonmanufacturing	766	3,677,400	289	1,730,400	234	1,417,500	47	250,850	84	499,300
Mining, crude petroleum, and natural gas.	15	167,000	6	148,200	4	133,200	—	—	3	140,000
Transportation[1]	76	665,600	35	322,700	25	215,200	18	142,200	4	15,100
Communications	69	600,900	54	508,450	52	499,750	3	18,250	5	64,550
Utilities, electric, and gas	73	212,350	49	148,950	46	128,500	2	3,850	10	39,050
Wholesale trade	16	28,250	10	19,800	6	12,300	1	1,000	4	7,500
Retail trade	123	429,750	82	323,250	59	218,500	14	42,750	44	165,250
Hotels and restaurants	37	172,400	13	73,000	11	54,200	2	7,000	3	21,750
Services	71	392,550	30	154,150	22	125,350	5	30,800	11	46,100
Construction	286	1,008,600	10	31,900	9	30,500	2	5,000	—	—
Miscellaneous nonmanufacturing	—	—	—	—	—	—	—	—	—	—

[1] Excludes railroads and airlines.

NOTE: Nonadditive.

No. 80-544

DEC 13 1980

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that petitioner's refusal to bargain with the Union about petitioner's decision to close a portion of its operation and to discharge the employees in that portion of its operation violated Section 8(a)(5) and (1) of the National Labor Relations Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	1
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Brockway Motor Trucks, 230 N.L.R.B. 1002, enforcement denied and case remanded for additional evidence, 582 F.2d 720 ..... 4-5, 7, 8, 9, 14, 15
Brooks-Scanlon, Inc., 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606 10
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 ..... 4, 8, 9-10, 11, 13, 14, 15, 16
General Motors Corp., 191 N.L.R.B. 951 10
Morrison Cafeterias Consolidated, Inc. v. *NLRB*, 431 F.2d 254 12
NLRB v. *Adams Dairy, Inc.*, 350 F.2d 108 12
NLRB v. *Drapery Manufacturing Co.*, 425 F.2d 1026 ..... 11, 12
NLRB v. *North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637 13
NLRB v. *Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615, 93 L.R.R.M. 2297, mem. decision, 541 F.2d 277 13
NLRB v. *Thompson Transport Co.*, 406 F.2d 698 .. 13
NLRB v. *Transmarine Navigation Corp.*, 380 F.2d 933 ..... 12, 13
NLRB v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 ..... 11, 12
Royal Typewriter Co. v. *NLRB*, 533 F.2d 1030 11

PREVIOUS PAGE WAS BLANK

Cases—Continued

Page

Sucesion Mario Mercado E Hijos d/b/a Central Rufina, 161 N.L.R.B. 696 10
Summit Tooling Co., 195 N.L.R.B. 479 10
Textile Workers v. *Darlington Manufacturing Co.*, 380 U.S. 263 ..... 12, 13
Westinghouse Electric Corporation (Mansfield Plant), 150 N.L.R.B. 1574 10

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5, 6
Section 8(a)(5), 29 U.S.C. 158(a)(5) 5, 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board are reported at 242 N.L.R.B. No. 72 (Pet. App. 21a-37a).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 38a.

STATEMENT

1. Petitioner, a New York corporation, supplies employees to perform housekeeping and maintenance services at the premises of its various commercial customers. Petitioner hires its own employees and, as their sole employer, trains and supervises them in the performance of the contracted-for services at its customers' premises (Pet. 2). During the spring of 1977, petitioner serviced between two and four nursing care institutions, including the Greenpark Care Center in Brooklyn, New York. Petitioner had been under contract with Greenpark since May 3, 1976, and employed approximately 35 employees there. The parties' contract required Greenpark to reimburse petitioner for its weekly payroll and fringe benefits

for its employees at Greenpark and to pay petitioner a weekly "professional services fee," which initially was set at $500, but was reduced to $250 as of November 1, 1976 (Pet. App. 4a, 28a-29a; A. 44, 46).[1] The contract also provided for termination by either party upon 30 days' written notice (A. 44).

In an election conducted by the Board on March 31, 1977, petitioner's Greenpark employees chose the Union[2] as their collective bargaining representative and on May 11, the Board certified the Union as the employees' exclusive bargaining representative. By a July 12, 1977 letter to petitioner, the Union requested a meeting to negotiate a collective bargaining agreement. Petitioner never responded to the Union's letter (Pet. App. 4a, 29a, 31a).

In the interim, petitioner and Greenpark had been experiencing problems in connection with their contract (Pet. App. 31a). In April 1977, petitioner informed Greenpark that it was losing money on its Greenpark operation and needed an increase in order to be able to continue providing services at Greenpark (A. 71). On June 30, petitioner requested that its professional services fee be increased to $500, and on July 6, petitioner sent Greenpark a mailgram stating that, unless the requested increase were granted, petitioner's services would be discontinued as of August 1, 1977 (Pet. App. 31a; A. 40).[3]

---

[1] "A." refers to the appendix in the court of appeals.

[2] District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

[3] Petitioner characterized the requested increase as being one "in profits per week" (A. 40).

Petitioner failed to receive the requested increase, and on July 25 it confirmed that it would terminate its services at Greenpark as of August 1, 1977 (Pet. App. 31a; A. 48). Petitioner never notified the Union of the intended closing (Pet. App. 4a, 29a-31a; A. 118).

On July 28, petitioner informed its Greenpark employees that as of July 31 the Greenpark operation would be closed and they all would be discharged (Pet. App. 4a, 29a, 31a). One of the employees then notified the Union of the anticipated closing (A. 117-118). Edward Wecker, the Union's vice-president, immediately telephoned the administrator of Greenpark, who confirmed that petitioner was terminating the contract and discharging the employees (A. 87, 91-92). When Wecker asked if Greenpark itself could retain the employees, the Greenpark administrator told him that the contract between petitioner and Greenpark prohibited Greenpark from hiring any of petitioner's employees for 90 days following termination of the contract (Pet. App. 31a; A. 44, 92-93).

Wecker then telephoned Leonard Marsh, a one-third owner and secretary-treasurer of petitioner, who stated that petitioner was "pulling out" because it was not making enough money. Wecker asked Marsh if he could "hold on a little longer" until the Union and petitioner could meet to discuss "how to keep the people working." Marsh refused, on the ground that, under the contract, petitioner would be required to remain at Greenpark for another full 30 days if it stayed past the notified termination date. Marsh added that, if Wecker could persuade Greenpark to waive the 30-day provision, Marsh "might be able to swing" a discussion with the Union. Wecker inquired about the possibility of petitioner's hiring the employees for its other locations, to which Marsh

responded in the negative. Marsh's response to Wecker's request that petitioner meet with the Union to discuss the matter was that they had "nothing to discuss." (Pet. App. 5a, 29a, 31a-32a.)

Thereafter, Wecker had telephone conversations and a meeting with representatives of Greenpark, but they told him that Greenpark could do nothing about petitioner's closing its Greenpark operation and discharging the employees (A. 98-101). On July 31, petitioner discontinued its Greenpark operation and discharged all of its Greenpark employees (Pet. App. 29a).

2. Relying in large part (Pet. App. 33a-34a) on this Court's decision in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the administrative law judge rejected petitioner's contention that its decision to close its Greenpark operation was a management prerogative outside the scope of mandatory collective bargaining. The administrative law judge found that "[t]here was no capital involved" when petitioner decided to terminate the Greenpark job; that petitioner's "regular and usual method of running its affairs" involves initiating and completing work at various customer installations; and that "[t]he closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size" (Pet. App. 33a). In these circumstances, "where it ha[d] not been shown that [petitioner's] decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of the enterprise,' " the administrative law judge concluded that petitioner had a duty to bargain with the Union about the decision to close the Greenpark operation (*ibid.*, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied

and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978)).

The Board upheld the administrative law judge's rulings, findings and conclusion that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the decision to close the Greenpark portion of its operations and the effects of the closing on the employees (Pet. App. 22a-23a).[4] The Board ordered petitioner, *inter alia*, to bargain with the Union about the decision to terminate the Greenpark operation and the possible resumption of it; if an agreement to resume the Greenpark operation were reached, to offer reinstatement at that operation to the discharged employees and to embody any such understanding in a written agreement; or if an agreement to resume the Greenpark operation were not reached, to bargain with the Union concerning the effects of the termination decision and to offer the terminated employees reinstatement to positions for which they were qualified at any of petitioner's other cleaning and maintenance operations (Pet. App. 22a-23a, 25a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-20a). Al-

---

[4] No issue is presented here concerning the Board's finding that petitioner unlawfully refused to bargain about the *effects* of the closing on the employees, since petitioner consented to enforcement of that portion of the Board's order by stipulation filed in the court of appeals (Pet. App. 5a; A. 21-22). Nor has petitioner ever disputed the Board's additional conclusion (Pet. App. 21a-22a n.1) that petitioner also refused to bargain with the Union, in violation of Section 8(a)(5) and (1), by failing to respond to the Union's July 12, 1977 letter demanding such bargaining (Pet. App. 5a). Thus, only the Board's determination that petitioner was required to bargain concerning its decision to terminate its Greenpark operation is at issue here.

though it recognized (Pet. App. 11a; footnote omitted) that a "partial closing affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute," the court emphasized (Pet. App. 10a-12a) that there is no *per se* rule mandating bargaining about all partial closing decisions: "the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" (Pet. App. 12a).

The court concluded (Pet. App. 13a-14a) that no such showing was made on the facts of the present case. It found material neither petitioner's assertion that it was losing money at Greenpark nor the fact that petitioner's financial losses were not attributable to labor costs (since, under the contract, Greenpark paid petitioner's employees' salaries and fringe benefits).[5] In the court of appeals' view, "the decisive factor * * * is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision" (Pet. App. 14a). The court found "[o]n the record here * * * sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (takebacks) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give [peti-

[5] It was primarily on the basis of those two factors that Judge Kearse dissented from that portion of the court's decision upholding the Board's conclusion that petitioner violated Section 8(a)(5) and (1) by refusing to bargain over the decision to close Greenpark (Pet. App. 16a-20a).

tioner] an increased management fee." "At least," the court concluded, if petitioner "had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution" (Pet. App. 14a).

ARGUMENT

1. Petitioner urges (Pet. 15) the adoption of a *per se* rule that "there is no duty to bargain over an economically motivated decision to terminate a portion of a business enterprise" (Pet. 10). The court of appeals properly rejected this argument, holding that, while there is an initial presumption that a partial closing is a mandatory subject of bargaining, the facts of each case must be taken into account in finally determining whether an employer has an obligation to bargain about a decision to close a portion of its business (Pet. App. 10a-12a).[6]

---

[6] The Third Circuit adopted an approach similar to that of the court below in *Brockway Motor Trucks, supra.* Both courts begin their analysis with a presumption that an issue so directly affecting employee job rights as a decision to terminate part of an enterprise is subject to mandatory bargaining (Pet. App. 11a; 582 F.2d at 735). Both courts hold, however, that that presumption may be rebutted by countervailing employer evidence demonstrating, for example, that bargaining over the decision at issue would be futile or that the closing was due to emergency financial considerations (Pet. App. 11a-12a; 582 F.2d at 738-739). The position of the court below (Pet. App. 12a, 13a n.8) that accommodation of the interests of management and labor must occur within the statutory framework and that the focus must be on whether the purposes of the Act would be furthered by the decision to impose a duty to bargain in a particular case does not indicate any fundamental

The court of appeals' approach is consistent with that employed by this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964). There, the Court held that the employer was required to bargain collectively about a decision to contract out its maintenance operations and terminate its own maintenance employees. Noting that the "decision to contract out the maintenance work did not alter the Company's basic operation" and that no capital investment was contemplated, the Court concluded that, on "[t]he facts of the present case," requiring the employer to bargain about this subject "would not significantly abridge his freedom to manage the business." 379 U.S. at 213. In those circumstances, the Court held that it was appropriate to require the employer to afford the employees "an opportunity to negotiate a mutually acceptable alternative" to the blanket elimination of their jobs, by such cost saving techniques as "reducing the work force, decreasing fringe benefits, and eliminating overtime payments." *Id.* at 213-214. The Court added that, "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." *Id.* at 214. As discussed at pages 5-7, *supra*, similar considerations obtain in the present case and were the specific basis for the decision below.

Contrary to the contention of petitioner (Pet. 15) and amicus, the Chamber of Commerce of the United States (Br. 5), the decision below is not inconsistent

---

disagreement between the two courts, but merely a difference in emphasis. See 582 F.2d at 739.

with Justice Stewart's concurring opinion in *Fibreboard*.[7] The court of appeals specifically noted (Pet. App. 13a n.8) that certain decisions may be "within managerial prerogative and not subject to mandatory bargaining" because they involve " 'a matter of fundamental entrepreneurial discretion.' " The administrative law judge had found, however, that there was no such " 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of [petitioner's] enterprise.' " Pet. App. 33a, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720, 739-741 (3d Cir. 1978).[8]

Both the majority and the concurring opinions in *Fibreboard* emphasized (379 U.S. at 213-215, 218,

---

[7] Justice Stewart, in whose concurrence Justices Douglas and Harlan joined, agreed that under the facts presented in *Fibreboard* there was a duty to bargain. He cautioned (379 U.S. at 223), however, that

> [n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding * * * managerial decisions [that] lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. * * * [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from [the] area [of mandatory bargaining].

[8] Indeed, he had found (Pet. App. 33a) that "[t]here was no capital involved" in the closing of petitioner's operations at this one site, and that the closing "in no sense altered the nature of its business" or "substantially affect[ed] its total size."

224-225) that the holding of that case depended on its particular facts. Similarly, the decision of the Board, which was upheld by the court of appeals, reflects an individualized appraisal of the facts of this case and does not control other situations in which the impact of collective bargaining on the legitimate interests of an employer may be greater.[9]

2. Once the decision below is properly viewed as largely dependent on the facts of the particular case, it becomes apparent that there is no square conflict between it and the decisions of other courts of appeals, since all of the cases relied on by petitioner are factually distinguishable from the present case, and since none adopts a *per se* rule that an employer has

---

[9] *See, e.g., Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606, 1607 (1979) ("Board does not require an employer to bargain over the closing of an operation in situations, such as here, where the decision is predicated on economic factors so compelling that bargaining could not alter them"); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972) ("We do not believe that the Act contemplated eliminating the prerogative of an employer, as here, to eliminate itself as an employer" by closing down a distinct line of business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971) ("decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much 'at the core of entrepreneurial control' "); *Sucesion Mario Mercado E Hijos d/b/a Central Rufina*, 161 N.L.R.B. 696 (1966) (no duty to bargain where compelling economic circumstances necessitated employer's decision to cease its sugar cane grinding operations for the season and contract out this work; " 'our condemnation in *Fibreboard* and like cases of unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved' " (*id.* at 700, quoting *Westinghouse Electric Corporation (Mansfield Plant)*, 150 N.L.R.B. 1574 (1965)).

no duty to bargain over an economically motivated decision to terminate a portion of its business.

While *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976), may contain the "most recent[] and cogent[]" (Pet. 11) statement of the rule urged by petitioner, that statement is mere dictum. The court in that case found it "unnecessary to discuss" the Board's finding that the decision to close one of the company's plants was a mandatory subject of bargaining in light of the Board's failure to order remedial relief for that violation (533 F.2d at 1039). In any event, the Eighth Circuit in addition noted (*id.* at 1038-1039 n.9) facts demonstrating the " 'pressing economic necessity' " underlying the employer's decision to close the plant. Similar facts were present in the other Eighth Circuit decisions relied on by petitioner and the *Royal Typewriter* court.

In *NLRB* v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965), three out of an employer's four Omaha-area customers cancelled their contracts with the employer (*id.* at 899), and the employer could not continue to serve its remaining Omaha customer "alone without incurring substantial financial loss." *Id.* at 902. In these circumstances, the court found that the "rationale of *Fibreboard* as applied to the facts of this case does not support the Board's decision." *Ibid.* Similarly, in *NLRB* v. *Drapery Manufacturing Co.*, 425 F.2d 1026 (8th Cir. 1970), the court held that the employer had no duty to bargain about its decision to close down its drapery operations after years of suffering "increasing losses" (*id.* at 1027). Moreover, the court distinguished *Fibreboard* on the ground that there "the work continued, with no major capital decision taking place," whereas in the case before it there was

"a major shift in capital investment": the company's machinery "was dismantled and removed from the premises and the drapery work was no longer controlled in any way by the company" (*id.* at 1028). In drawing that distinction, the Eighth Circuit relied (*ibid.*) on its previous decision in *NLRB* v *Adams Dairy, Inc.*, 350 F.2d 108 (1965). In that case, the employer had decided to terminate distribution of its own milk. In holding that such a decision was not a mandatory subject of bargaining, the court contrasted it with the situation in *Fibreboard* (*id.* at 111): "there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment." [10]

The Ninth Circuit employed a similar analysis in holding that an employer had no duty to bargain about its decision to terminate its operations in one city and relocate as a minority partner in a joint venture. *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933 (1967). The court emphasized the factual differences between *Fibreboard* and that case,

---

[10] In *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 257 (1970), the Eighth Circuit relied on *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), to hold that an employer had no duty to bargain concerning its decision to close one of its cafeterias. To the extent that *William J. Burns International Detective Agency, Inc.*, *supra*, 346 F.2d at 902, and *Adams Dairy, Inc.*, *supra*, 350 F.2d at 111-113, suggest that *Darlington* compels the conclusion that partial closing decisions are not mandatory subjects of bargaining, they are in error. As petitioner concedes (Pet. 8-9), that issue was not presented in *Darlington*.

citing facts showing that the decision in *Transmarine* "made fundamental changes in the direction and operation of the corporate enterprise, which greatly affected its capital, assets, and personnel," and concluding that "the decision here brought about a major commitment of capital and a fundamental alteration of the corporate enterprise; unlike *Fibreboard*, it was not merely a decision to achieve economies by reducing the work force and fringe benefits of the union." *Id.* at 937. Finally, in *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (1969), the Tenth Circuit held that an employer had no duty to bargain about closing a terminal after it had "lost the major part of its * * * business [in that area,]" where "[n]o amount of collective bargaining could erase the economic facts that gave rise to the Company's decision to close and its change of operation could in no way be characterized as a 'farming out' or other procedure to continue its operation in a new or different manner." The "conflicts" alleged by petitioner are thus nothing more than differences in results dictated by the differences in the facts presented by the respective cases relied on by petitioner.[11]

---

[11] Petitioner's attempt (Pet. 12) to establish a conflict between the decision below and those of the Fourth Circuit similarly fails. That court's decision in *NLRB* v. *Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615, 93 L.R.R.M. 2297 (unpublished opinion), officially reported mem. decision, 541 F.2d 277 (1976), was based on its misapprehension that *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), held that a partial closing is an unfair labor practice *only* if it is motivated by an anti-union purpose. See note 10, *supra*. And, as petitioner recognizes (Pet. 12), the statements of the court in *NLRB* v. *North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637 (1976), were mere

3. The Chamber of Commerce contends (Br. 3-4, 7-8) that the decision below fails to provide a sufficiently clear standard to guide management in determining whether to bargain collectively with its employees before effecting a partial closing and thus eliminating their jobs. As demonstrated at pages 8-10, *supra*, however, the approach adopted by the Second Circuit in the present case is essentially that which this Court employed in *Fibreboard*. Just as *Fibreboard* left the scope of an employer's obligation to bargain about "contracting out" or "subcontracting" to development on a case-by-case basis, so may the bargainability of partial closings properly be left to such development. The Chamber's exclusive focus (Br. 4-5) on management's interest in being able "to proceed decisively" and with "crisp responsiveness" to eliminate "marginal or uneconomic operations" ignores the "countervailing interests of the employees in a decision immediately affecting their fortunes." *Brockway Motor Trucks*, *supra*, 582 F.2d at 734 n.83.[12] Moreover, it ignores the benefits that man-

---

dictum, since in that case the employer's claims of economic justification were held to be pretextual.

[12] Similarly, the Chamber's concern (Br. 6) that, if a decision to close part of an enterprise were a mandatory bargaining subject, employees would strike in an effort to persuade the employer not to eliminate their jobs assumes that the only legitimate interests are those of management and, thus, that management is entitled to protection from such economic power as the employees may be able to wield in the protection of their own livelihoods. But, as *Brockway Motor Trucks* recognizes (582 F.2d at 734), "[o]ne of the major norms governing the operation of the federal labor laws is that both sides of the controversy, the employer's and the employees', should be seen as crucial, and one should not be exalted to the exclusion of the other."

agement may derive from "sitting down with the union and discussing, even briefly, the decision to close a plant * * *" (*ibid.*), for "labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Id.* at 736. Accord, *Fibreboard*, *supra*, 379 U.S. at 213-214.

4. Finally, petitioner's suggestion (Pet. 15-16) that there is inadequate support for the lower court's finding that "bargaining could reasonably [have] be[en] expected to modify or reverse [petitioner's] decision" presents only a factual issue, which does not warrant review by this Court. In any event, petitioner's attack on the court's finding is without merit.

Petitioner asserts (Pet. 16) that the finding is refuted by the following factors: (1) Greenpark had no bargaining relationship with or other obligation to the Union; (2) Greenpark had refused to waive the 30-day provision in its contract with petitioner, which would have permitted petitioner to bargain with the Union without being obligated to remain at Greenpark for a full additional month; and (3) Greenpark had never suggested a reduction in staffing in order to increase petitioner's fee during negotiations between the parties in June and July 1977.

Petitioner overlooks that it had an obligation to bargain with the Union when the Union first requested bargaining on July 12 (see note 4, *supra*), and that it ignored that request and unilaterally announced its decision to close its Greenpark operation more than two weeks later, without prior notice to the Union. Had petitioner timely responded to the Union's bargaining request and given the Union prompt notice of its economic difficulties and an op-

portunity to bargain over the projected closing, the Union would have had a strong incentive to cut labor costs in order to prevent the total elimination of jobs. If the Union had been willing to accept such a cut, petitioner could have notified Greenpark of a concomitant reduction in labor costs and requested an increase in its management fee. Greenpark might well have been willing to accept a total package that cost it no more, but merely redistributed the costs between petitioner and the employees.

In short, petitioner has failed to demonstrate that bargaining would have been futile or that it would have resulted in any delay of the closing, if petitioner had timely responded to the Union's bargaining request. Indeed, petitioner has failed to demonstrate any legitimate economic justification for its refusal to provide the Union "with an opportunity to negotiate a mutually acceptable alternative" to the closing and resulting discharge of some 35 employees. *Fibreboard, supra*, 379 U.S. at 214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334375 193

No. 80-544

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARVIN E. FRANKEL
SAUL G. KRAMER

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 593-9000

Attorneys for the Chamber of Commerce of the United States of America, Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3186

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities i

Interest of the *Amicus Curiae* 1

Argument—The Question Presented Is Recurrent, Important, and Shrouded in the Uncertainty of Conflicting and Divergent Lower Court Decisions, Calling For Authoritative Guidance By This Court 3

Conclusion 9

TABLE OF AUTHORITIES

Brockway Motor Trucks, Division of Mack Trucks, Inc., 251 N.L.R.B. No. 23 (1980) 5

Brockway Motor Trucks v. *NLRB*, 582 F.2d 720 (3d Cir. 1978) 3, 5, 8

Consolidated Edison Co. v. *Public Service Commission*, ____ U.S. ____, 100 S. Ct. 2326 (1980) 2

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) 2, 5

Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, ____ U.S. ____, 100 S. Ct. 2844 (1980) 2

NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) 6

PAGE

NLRB v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961) 6

New York Telephone Co. v. *New York Department of Labor*, 440 U.S. 519 (1979) 2

Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) 5, 8

SEC v. Chenery Corp., 332 U.S. 194 (1947) 9

Statutes

National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 158(d) (1976) 2

Other

Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970) 5

Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing Is a Mandatory Subject of Bargaining*, 47 GEO. WASH. L. REV. 679 (1979) .. 4

Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089 (1967) 5

U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1979 ed.)..... 4

U.S. DEPARTMENT OF LABOR, MONTHLY LABOR REVIEW (February 1980) 4

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United States Chamber of Commerce submits this brief as *amicus curiae,* with the written consent of the parties pursuant to Rule 36.1, supporting the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the Nation; it has a direct membership of over 97,000 corporations, partnerships, proprietorships, and individuals, as well as over 4000 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents the interests of its members before the United States Congress, the Executive Branch, the federal regulatory agencies and, increasingly, the courts. Its appearances in litigation matters have included participation as *amicus curiae* in numerous cases before this Court.[1]

The Court of Appeals for the Second Circuit in this case has formulated a "presumption" that the decision to close a portion of a business, based upon economic considerations alone, is a mandatory subject of bargaining under the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 158(d) (1976). The case "stirs large issues" regarding the appropriate role of the collective bargaining representative in resolving fundamental business policy questions which lie "at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 217, 223 (1964) (Stewart, J., concurring).

For reasons sketched in the petition and in the dissent below, this *amicus* believes the decision of the Second Circuit is erroneous. Whether right or wrong, however, its conflict with decisions of other Circuits, and a broader contrariety of views in the lower federal courts even where there is no square conflict, beclouds a vital area of entrepreneurial functioning. This uncertainty, affecting numerous decisions of importance for the Nation's economy, presents a classic occasion for authoritative resolution by this Court.

---

1 *E.g., Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, ___ U.S. ___, 100 S. Ct. 2844 (1980); *Consolidated Edison Co.* v. *Public Serv. Comm.*, ___ U.S. ___, 100 S. Ct. 2326 (1980); *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979).

ARGUMENT

THE QUESTION PRESENTED IS RECURRENT, IMPORTANT, AND SHROUDED IN THE UNCERTAINTIES OF CONFLICTING AND DIVERGENT LOWER COURT DECISIONS, CALLING FOR AUTHORITATIVE GUIDANCE BY THIS COURT

The petition for a writ of certiorari demonstrates a conflict between the decision below and decisions in other Circuits; a substantial measure of disagreement even between decisions that may not squarely and literally conflict; and substantial ground for urging that the decision here in question is wrong. Joining in those submissions without repeating them, the Chamber of Commerce stresses the profound significance of this subject for our economy and the high cost of confusion and unpredictability. Submitting that the court of appeals has erred in expanding the scope of mandatory bargaining, we would stress still more urgently the need for a rationale more intelligible than that court's "presumption" of bargainability coupled with an employer's burden of predicting whether the union's demand will be found some day to fulfill the purposes of the National Labor Relations Act. The Second Circuit's presumption diverges in this aspect from that of the Third Circuit, where the court recognizes a similar presumption and requires the employer to demonstrate that its economic interest in unilateral action outweighs its employees' stake in their jobs. *See Brockway Motor Trucks* v. *NLRB,* 582 F.2d 720, 735 (3d Cir. 1978). Both are effectively similar, however, in generating doubt

rather than giving light for a key area of managerial concern.[2]

1. A vital national economy requires a maximally free flow and effective use of its economic resources. If a healthy state of productivity is to be maintained, business managers must be able to proceed decisively when confronted with the necessity to terminate marginal or uneconomic operations. The need is especially acute in our time, when we are experiencing sharp declines either in the rate of increased productivity or, more alarmingly, in absolute productivity figures.[3]

The decision of the Court of Appeals for the Second Circuit in this case, creating an ill-defined, and therefore possibly irrefutable, "presumption" that an employer's partial closing of its business for economic reasons is a mandatory subject of collective bargaining, embodies a

---

2 *See* Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing Is a Mandatory Subject of Bargaining*, 47 GEO. WASH. L. REV. 679, 697-98 (1979).

3 Between 1976 and 1978, for example, the annual improvement in productivity in private nonfarm business slowed from 3.5% in 1976, to 1.3% in 1977, to .5% in 1978. In 1974, the same measure of productivity showed a 3.1% decrease from 1973. Between 1977 and 1978, productivity rates declined in such industries as corrugated boxes, footwear, hosiery, malt beverages, paper milling, and mining. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 413-14 (1979 ed.).

In the first three fiscal quarters of 1979, productivity rates declined in all nonfarm sectors of the economy with the exception of nondurable manufactured goods, which increased 8.7%. Productivity in the durable goods sector, which accounts for about 60% of all manufacturing employment, declined 0.2%. The 8.7% increase in productivity of nondurable goods was attributable in part to a drop in employment in this sector. Fulco, *Productivity Declines Continue Into Third Quarter 1979*, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW 46 (February 1980).

rule that will hobble managerial flexibility in allocating both capital and labor. The decision constricts an area of choices "which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 223 (1964) (Stewart, J., concurring). It would transfer critical business judgments from the hands of those who have overall responsibility and a broad perspective to organizations which have a relatively narrow and exclusive concern with jobs under their jurisdiction. *See* Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. REV. 1089, 1091 (1967); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain,* 39 FORDHAM L. REV. 81 (1970). At a particularly inopportune time in our history, it would tend to rigidify processes in which crisp responsiveness and adaptability are prime requisites.

2. The deleterious impact upon business management appears to have been ordered by the Second Circuit, in this respect resembling the Third Circuit, without a full appreciation of its significance. A good deal more flows from the rule of decision than requiring " 'full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives. . . .' "[4] *See* to similar effect the Board's reference to the "minimal burden" of such required bargaining over partial closing decisions.[5]

---

4 Opinion below, App. A to the petition for certiorari (hereinafter "App. A") at 8a, quoting from *Ozark Trailers, Inc.,* 161 N.L.R.B. 561, 568 (1966).

5 *Brockway Motor Trucks, Div. of Mack Trucks, Inc.,* 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks* v. *NLRB,*

More is at stake than the delay involved in bargaining sessions, though this is likely in many cases to be destructive enough. For if the decision to close a portion of the business is a mandatory subject of bargaining, employees have a right, protected under Section 7 of the Act, to strike in support of their position. The use of such economic pressure "is part and parcel of the process of collective bargaining." *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 495 (1960). Armed with this weapon, a union perceiving no rational economic alternative to the partial closing decision is nonetheless free to seek coerced continuation of the operation both by striking the facility directly involved and by picketing or striking other installations of the same employer. The strike may "persuade" the employer to continue an uneconomic or marginally profitable activity, foregoing superior and more rational allocation of the affected resources, in order to avoid losses from economic pressure on its more profitable operations.

Consequences of this kind, if fairly compelled by what Congress wrote in the National Labor Relations Act, might call for legislative reconsideration of the statute in question. It bears remembering, however, that the course of decision on partial closings, as shown in the petition for certiorari (pp. 9-13), has been contrary to the ruling of which review is now sought. The Third and Second Circuits have arrived only in the last year or two at their differently defined "presumptions" of mandatory bargainability.[6] *See* pp. 7-9, *infra.* The conflict that has now

---

supra, 582 F.2d 720 (3d Cir. 1978), *petition for review filed,* No. 80-2327 (3d Cir. Sept. 19, 1980).

6 The decision of the court below departs from the rationale of *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), where the

emerged is a matter of special moment in light of the substantial injuries threatened by the novel departures.

3. Beyond its seeming error as a matter of precedent, sound labor law policy, and statutory construction, the decision below gives concern because it remits the parties in bargaining relationships to clouded speculation as to their respective rights and duties. The court of appeals, holding there is a "presumption" that partial closing decisions are mandatorily bargainable, says the presumption "may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" (App. A at 12a). In an effort to particularize that standard, the court goes on to opine that the rebuttal could be accomplished by showing "that bargaining over the decision would be futile" (*id.*), adding "[o]ther relevant considerations" and hypothetical circumstances that "might" defeat the presumption.[7]

---

court held that an employer's decision to close one plant and transfer the work to another "was clearly within the realm of managerial discretion." *Id.* at 176. The court here indicated that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* decision (App. A at 9a n.4). Similarly, Judge Rosenn, dissenting in *Brockway*, noted that the court's decision "departs from the principles of [the] court's landmark decision in *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965)," where the court had found no bargaining obligation with respect to a partial closing decision premised solely on economic reasons. 582 F.2d at 741.

7 "Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off

Reflecting upon these hypothetical possibilities, which depart from the Board's views as well as those of every other Circuit that has addressed the problem,[8] it seems obvious that the parties in a collective relationship are left to murky prediction in assessing whether it will some day be held that there was a duty to bargain. Guesses of this nature are to be made at the risk of large back-pay liabilities and potentially devastating injunctive relief in the process of implementing managerial judgments. A decision engendering such doubts on problems of such consequence calls at the least for authoritative revision and clarification.

The Second Circuit's departure from the Board's own rationale merits some special attention. The Board in this case followed, and urged upon the Circuit (App. A at 10a), what amounts to a "*per se* rule"—"imposing a duty to bargain whenever an employer closes part of its business. . . ."[9] There is not simply a presumption under the Board's view, and there are no speculative problems of potential rebuttals. Though it has the virtue

---

was small and the number of the remainder was large" (App. A at 12a).

8 The Third Circuit's earlier decision finding a presumption of mandatory bargaining states a quite different, if not more sharply specific, test for rebuttal. It holds that the respective interests of employees and employers must be balanced in light of the facts of the particular case to determine if the bargaining presumption has been overcome, and says it will give some weight to the fact that, even though bargaining will as a practical matter be futile, the parties "[m]erely by sitting down together . . . may achieve important aims." *Brockway Motor Trucks, supra,* 582 F.2d at 737 n.92.

9 The fountainhead of the rule is *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), followed by the Board in this case (App. A at 21a, 33a-34a). *See* petition for certiorari at 9.

of simplicity and intelligibility, that position has found approval in no Circuit. The point of special interest here is that the court of appeals, finding a need to reject the Board's reasoning while enforcing its result, was driven to the erroneous course of affirming "administrative action by substituting what it consider[ed] to be a more adequate or proper basis." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). That serves at a minimum to intensify the uncertainty governing a profoundly important subject of the national labor law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARVIN E. FRANKEL
SAUL G. KRAMER

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 593-9000

Attorneys for the Chamber of Commerce of the United States of America, Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3186

October, 1980

FILE

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FIRST NATIONAL MAINTENANCE CORPORATION

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
PERRY S. HEIDECKER

MILMAN, NANESS & POLLACK
1175 West Broadway
Hewlett, New York 11557

Attorneys for Petitioner
First National Maintenance Corp.

Of Counsel:

SANFORD E. POLLACK
PERRY S. HEIDECKER

QUESTION PRESENTED

Whether an employer's unilateral decision to terminate a losing portion of its operations solely for legitimate business reasons breaches the duty to bargain under Section 158(a)(5) of the National Labor Relations Act.

TABLE OF CONTENTS

PAGE

Questions Presented i

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

The Board's Conclusions of Law and Order 5

The Decision of the Court of Appeals 6

Summary of Argument 7

Argument 9

I. THE N.L.R.A. DOES NOT REQUIRE AN EMPLOYER TO BARGAIN WITH THE UNION ABOUT THE EMPLOYER'S DECISION TO DISCONTINUE PART OF A BUSINESS SOLELY FOR ECONOMIC REASONS 9

A. The Language of the Statute and its Legislative History 9

B. *Fibreboard* and *Darlington* 12

II. THE APPLICATION OF THE PRINCIPLES ADOPTED BY THIS COURT IN *FIBREBOARD* WARRANTS REVERSAL IN THE INSTANT CASE 15

A. A Literal Approach to Bargainability Determinations Involving Closings of a Facility in Whole or in Part Should be Rejected 15

1. To Require an Employer to Bargain With a Union Regarding its Economically Motivated Decision to Close a Portion of its Business Does Not Effectuate the Purposes of the National Labor Relations Act 18

PAGE

2. Existing Industrial Bargaining Practices Do Not Support a Mandatory Bargaining Obligation Where a Facility is Being Closed as a Result of an Employer's Economically Motivated Decision 20

3. The Facts of this Case Lead to the Conclusion that Mandatory Bargaining is Inappropriate 24

III. THE COURT BELOW HAS MISCONSTRUED THE DECISION OF THIS HONORABLE COURT IN *FIBREBOARD* AND HAS THEREBY ERRONEOUSLY EXPANDED THE SCOPE OF MANAGEMENT'S BARGAINING OBLIGATION 26

IV. A MAJORITY OF THE CIRCUITS HAVE HELD THAT A DECISION TO CLOSE AN ECONOMICALLY UNPROFITABLE PORTION OF A BUSINESS IN THE ABSENCE OF UNION ANIMUS IS NOT A MANDATORY SUBJECT OF NEGOTIATIONS 29

Conclusion 35

Appendix A—Decision and Order of the Court of Appeals for the Second Circuit 1

Appendix B—Pertinent Provisions of the National Labor Relations Act, as amended 21

BLS-A—Excerpts from U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969) 22

BLS-B—Relevant Excerpts from U.S. Bureau of Labor Statistics, Department of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980) 42

TABLE OF AUTHORITIES

CASES	PAGE
Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 Sup. Ct. 383, 30 L.Ed. 2d 341, 78 L.R.R.M. 2974, 66 Lab. Cas. ¶ 12,254 (1971)	21
Auto Stone Works, 81 N.L.R.B. 1203, 23 L.R.R.M. 2484, 48-9 Lab. Cas. ¶ 8696 (1949)	14
Brockway Motor Trucks, 251 N.L.R.B. No. 23, 104 L.R.R.M. 1515, 80 CCH ¶ 17,224 (1980), *on remand from Brockway Motor Trucks v. NLRB*, 382 F.2d 720, 99 L.R.R.M. 2013 (3rd Cir. 1979)	17, 31, 33
Buffalo Forge Co. v. USW, 428 U.S. 397, 96 Sup. Ct. 3141, 49 L.Ed. 2d 1022, 92 L.R.R.M. 3032, 78 Lab. Cas. ¶ 11,487 (1976)	19
William J. Burns International Detective Agency, Inc., 148 N.L.R.B. 1267, 57 L.R.R.M. 1163, 64 CCH ¶ 13,447 (1964), *enforcement denied*, 346 F.2d 897, 59 L.R.R.M. 2523, 51 Lab. Cas. ¶ 19,785 (1968)	17, 30, 31
J.E. Cote, 101 N.L.R.B. 1486, 31 L.R.R.M. 1250, 52-3 CCH ¶ 12,079 (1952)	14
Empire Dental Co., 211 N.L.R.B. 860 (1974)	32
Equitable Gas Co. v. NLRB, _____ F.2d _____, 106 L.R.R.M. 2201 (3rd Cir. 1981)	33
Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 Sup. Ct. 398, 13 L.Ed. 2d 233, 57 L.R.R.M. 2609, 50 Lab. Cas. ¶ 19,384 (1964)	*passim*
Ford Motor Co. v. NLRB, 441 U.S. 488, 99 Sup. Ct. 1842, 60 L.Ed. 2d 420, 101 L.R.R.M. 2222, 86 Lab. Cas. ¶ 11,282 (1979)	11
Gary-Hobart Water Corp., 210 N.L.R.B. 742, 86 L.R.R.M. 1210, 74 CCH ¶ 26,516 (1974)	19
General Motors Corp., 191 N.L.R.B. 951, 77 L.R.R.M. 1537, 71 CCH ¶ 23,264 (1971)	5

PAGE

International Union, UAW v. NLRB, 470 F.2d 422, 81 L.R.R.M. 2439, 69 Lab. Cas. ¶ 13,070 (D.C. Cir. 1972) 5

Krantz Wire & Manufacturing Co., 97 N.L.R.B. 971, 29 L.R.R.M. 1191, 51-2 CCH ¶ 11,332 (1952) 14

Lauer's Furniture Stores, Inc., 246 N.L.R.B. No. 58, 102 L.R.R.M. 1593, 79-0 CCH ¶ 16,528 (1979)..... 16

Mahoning Mining Co., 61 N.L.R.B. 792, 16 L.R.R.M. 116, _____ CCH _____ (1945)..... 14

Metro Transportation Services Co., 218 N.L.R.B. 534 (1975) 31

Morrison Cafeterias Consol., Inc., 177 N.L.R.B. 591, 71 L.R.R.M. 1449, 69 CCH ¶ 21,112 (1969), *enforcement denied,* 431 F.2d 254, 74 L.R.R.M. 3048, 63 Lab. Cas. ¶ 11,115 (8th Cir. 1970).....17, 30, 31

National Family Opinion, Inc., 246 N.L.R.B. No. 84, 102 L.R.R.M. 1641, 79-0 CCH ¶ 16,550 (1979)..... 16

North Carolina Coastal Motor Lines, Inc., 219 N.L.R.B. 1009, 90 L.R.R.M. 1114, 74-5 CCH ¶ 16,073 (1975), *enf'd.,* 542 F.2d 637, 93 L.R.R.M. 2411, 79 Lab. Cas. ¶ 11,693 (4th Cir. 1976) 16, 31

NLRB v. American National Insurance Co., 343 U.S. 395, 72 Sup. Ct. 824, 96 L.Ed. 1027, 30 L.R.R.M. 2147, 71 Lab. Cas. ¶ 66,980 (1952) 7, 16, 19

NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084, 52 Lab. Cas. ¶ 16,625 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011, 61 L.R.R.M. 2192, 52 Lab. Cas. ¶ 16,840 (1966)..... 30

NLRB v. Drapery Manufacturing Co., 425 F.2d 1026, 74 L.R.R.M. 2224, 62 Lab. Cas. ¶ 10,819 (8th Cir. 1970) 30

NLRB v. Edward M. Rude Carrier Corp., 79 CCH ¶ 11,615, 93 L.R.R.M. 2297, *reported without published opinion,* 541 F.2d 277 (4th Cir. 1976)..... 31

PAGE

NLRB v. Insurance Agents International Union, 361 U.S. 477, 80 Sup. Ct. 419, 4 L.Ed. 2d 454, 39 Lab. Cas. ¶ 66,239 , 45 L.R.R.M. 2704 (1960)..... 18

NLRB v. Iron Workers, 434 U.S. 335, 98 Sup. Ct., 651, 54 L.Ed. 2d 586, 97 L.R.R.M. 2333, 83 Lab. Cas. ¶ 10,296 (1978) 32

NLRB v. International Harvester Co., 618 F.2d 85, 104 L.R.R.M. 3098, 88 Lab. Cas. ¶ 12,073 (9th Cir. 1980) 32

NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 48 L.R.R.M. 2658, 43 Lab. Cas. ¶ 17,066 (2d Cir. 1961) 11

NLRB v. Thompson Transport Co., 406 F.2d 698, 70 L.R.R.M. 2418, 59 Lab. Cas. ¶ 13,240 (10th Cir. 1969)..... 31

NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 54 L.R.R.M. 2861, 55 Lab. Cas. ¶ 12,028 (9th Cir. 1967).....31, 33

NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 78 Sup. Ct. 718, 2 L.Ed. 2d 823, 42 L.R.R.M. 2034, 34 Lab. Cas. ¶ 71,492 (1958) 10

Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. 1264, 67 CCH ¶ 20,834 (1966).....5, 6, 16, 30

Pine Valley Div. of Ethan Allen, Inc., 218 N.L.R.B. 208, 89 L.R.R.M. 1780, 74-5 CCH ¶ 15,807 (1975)..... 17

Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 92 L.R.R.M. 2013, 78 Lab. Cas. ¶ 11,369 (8th Cir. 1976) 30

Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263, 85 Sup. Ct. 994, 13 L.Ed. 2d 827, 58 L.R.R.M. 2657, 51 Lab. Cas. ¶ 19,590 (1965) .13, 30, 31

Town & Country Mfg. Co., 136 N.L.R.B. 1022, 49 L.R.R.M. 1918, 62 CCH ¶ 11,100 (1962)..... 14

Walter Holm & Co., 87 N.L.R.B. 1169, 25 L.R.R.M. 1270, 49-0 CCH ¶ 9542 (1949) 14

PAGE

STATUTES:

United States Code:

Title 29, U.S.C. Section 158(a)(1) ..... *passim*

Title 29, U.S.C. Section 158(a)(3) 31

Title 29, U.S.C. Section 158(a)(5) 31

Title 29, U.S.C. Section 158(d) ..... *passim*

OTHER AUTHORITIES:

Bureau of National Affairs, "Basic Patterns: Management and Union Rights", *Collective Bargaining Negotiations and Contracts* § 65:1 (1979) 22, 23

Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. Rev. 1089 (1967) 20

Arthur B. Smith, *The Supreme Court, The Boys Market Labor Injunctions & Sympathy Work Stoppages*, 44 U. Ch. Rev. 321 (1976) 19

U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-8, *Major Collective Bargaining Agreements—Subcontracting* (1969) 23

U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements—Plant Movement, Transfer, and Relocation Allowances* (1969) 21

U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] is reported officially at 627 F.2d 596 and is reported unofficially at 104 L.R.R.M. 2924. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported officially at 242 N.L.R.B. No. 72 (1979) and are reported unofficially at 101 L.R.R.M. 1177 and 79-0 CCH ¶ 15,849. No other written opinions have been delivered.

---

1 The decision below is set forth in Appendix A.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit enforcing the Board's order was entered on July 9, 1980. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act (29 U.S.C. § 141, et seq.), as amended, are Sections 158(a)(1), 158(a)(3), 158(a)(5) and 158(d). They are set forth in Appendix B.

STATEMENT OF THE CASE

The petitioner provides housekeeping and maintenance services for various customers. (J.A. 2).[2] It hires its own employees, and, as their sole employer, trains and supervises them in the performance of the contracted-for services at the customer's premises. (J.A. 2). There is no interchange of petitioner's employees between customer locations. (J.A. 85). During the spring and summer of 1977, the petitioner serviced between two and four nursing or old age homes, including the Greenpark Care Center in Brooklyn, where this case arose in July of that year. (J.A. 84). Petitioner had been under contract with Greenpark since April, 1976, and employed approximately 35 people in its operation there. (J.A. 62-63).

Petitioner had first contracted on April 28, 1976 to provide services at Greenpark. (J.A. 43-45). Under the agreement, and an annexed manual which described the overall basis for the services, petitioner furnished all necessary labor, supervision,

---

2 "J.A." refers to the Appendix to this Honorable Court in the court of appeals submitted by the Solicitor General as a Joint Appendix.

training, tools, equipment and supplies required to do the work in a competent manner without interfering with the operations of the Center. In return, Greenpark provided necessary storage space, paid a management fee and reimbursed the petitioner for its gross weekly payroll and fringe benefits. (J.A. 43).

Either party had the right to terminate the agreement at any time by serving the other with 30 days' prior written notice. (J.A. 4). The agreement provided that, upon its termination, the Center would be prohibited from hiring any of petitioner's former employees for a period of 90 days. (J.A. 44). In March 1977, the Center served such notice on petitioner because of the maintenance staff's purported lack of efficiency. (J.A. 4). The parties were able to resolve this problem and the notice was rescinded. (J.A. 4).

On March 31, 1977, the Board conducted a secret ballot election among petitioner's employees at Greenpark. On May 11, the Board certified District 1199[3] as the representative of those employees. On July 12, District 1199 wrote to petitioner (apparently for the first time) noting its certification and its right to bargain and negotiate a contract for petitioner's employees working at Greenpark, and concluded: "We look forward to meeting with you or your representative for that purpose." (J.A. 2, 39).

In the meantime, on June 30, 1977, petitioner orally requested that the Center increase the management fee by $500 a week and advised the Center that if such an increase were not forthcoming the petitioner would discontinue its services effective August 1. (J.A. 72-73). A confirming mailgram to this effect was sent on July 6. (J.A. 40).

The April 28, 1976 agreement had set the management fee at $500 a week. (J.A. 44). Effective November 1, 1976, the fee was reduced to $250 a week; it remained at that level through

---

3 District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

July 31, 1977, when petitioner withdrew from Greenpark. (J.A. 38, 46, 78). It is uncontroverted that petitioner was losing money at Greenpark. (J.A. 4).

Petitioner met with representatives of the Center on July 25 and was unable to negotiate an increase in the management fee. (J.A. 74-75). Therefore, that same day, petitioner wrote to Greenpark to advise it that all services would be discontinued effective midnight July 31. (J.A. 41).

Petitioner advised its employees on July 28 that they would be terminated on July 31. (J.A. 3, 77). Upon hearing of this, a representative of District 1199 called one of petitioner's principals and asked if the union could wait a while before withdrawing and terminating the employees. (J.A. 3, 79-80). Petitioner explained that if it stayed on beyond July 31 it would have to continue for another 30 days and that petitioner "couldn't afford it". (J.A. 80, 85). Petitioner suggested that the union representative discuss the matter with the Center to see if it would waive the 30-day notice provision. Given such a waiver, petitioner said, it "might be able to swing it." The representative of the union contacted the Center and was advised that it would have to get clearance from its attorneys. (J.A. 94). The next day (July 29), the Center informed the union that it would not waive the 30-day notice provision. (J.A. 98-99).

Petitioner withdrew from Greenpark on July 31. On August 1, the representative of District 1199 met with the owner and other representatives of the Center and asked, among other things, if the Center would hire petitioner's former employees. (J.A. 99-101). The union was then advised that a 90-day provision in the Center's contract with petitioner precluded it from hiring or keeping those people on the premises. (J.A. 100). There is no evidence that the union requested that petitioner waive this provision.

THE BOARD'S CONCLUSIONS OF LAW AND ORDER

The Board, substantially adopting the conclusions of law of the Administrative Law Judge, found that petitioner had violated Section 8(a)(5) of the Act by unilaterally closing its Greenpark operation without bargaining with the union about the decision and by failing to respond to the union's July 12, 1977 request for bargaining. The Board further accepted the ALJ's finding that, by so refusing to bargain, petitioner had interfered with its employees' exercise of rights guaranteed to them under Section 7 of the Act, and thereby had violated Section 8(a)(1). The Board applied the doctrine it had established in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), *as modified by General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972), that an employer has a duty to bargain over a decision to close a portion of its business unless that decision involves "such a significant investment or withdrawal of capital as to affect the scope and ultimate direction of the enterprise." (J.A. 1-9, 12-20).

The Board's order directed petitioner to bargain with the union with respect to the decision to terminate its operation at the Greenpark facility and, in the event petitioner did not resume the Greenpark operation, with respect to the effects of the decision to terminate.[4] The Board also directed petitioner to reinstate the discharged employees if the Greenpark operation was resumed, and, if the operation was not resumed, to place the discharged employees on a preferential hiring list for employment in other operations. Finally, the Board ordered

---

4 The portion of the decision regarding "effects" was not a contested subject at the Board level, and is of no concern here. In a stipulation entered into prior to the submission of briefs to the court below, petitioner consented to the enforcement of the Board order directing petitioner to bargain over the effects of its termination at Greenpark. In that stipulation the parties agreed that effects bargaining took place subsequent to the administrative hearing, with petitioner agreeing to the payment of severance pay to the affected employees. (J.A. 19).

back pay for the discharged employees from the date of discharge to the date of any agreement or impasse reached in collective bargaining with the union. (J.A. 15-18).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Second Circuit, acting upon the petition of the Board pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by a 2-1 vote. (App. A. at 7). The court expressly declined to follow the *per se* approach established by the Board in *Ozark Trailers, supra,* but rather held that this Honorable Court's decision in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), support a presumption that there is a duty to bargain over a decision to close a portion of an ongoing business. (App. A. at 4-5).

The court of appeals observed that there are conflicting positions in the circuits and a lack of clear direction under *Fibreboard.* (App. A. at 3-4). It reasoned that a partial closing "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the *Fibreboard* Court found to fall within the literal meaning of the statute." (App. A. at 5). The court said that this presumption could be rebutted by a showing that the "purposes of the statute would not be furthered by imposition of a duty to bargain," but found that no such showing had been made in this case. (App. A. at 5-6). Specifically, the court found that there was "significant reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits . . . or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee." (App. A. at 6).

Judge Kearse, dissenting, would have denied enforcement of the Board's order on the ground that this Court's "carefully limited decision in *Fibreboard* . . . [does not require petitioner] to bargain over its decision to terminate" the Greenpark operation, especially since the losses suffered were unrelated to labor costs. (App. A. at 7). She concluded that peti-

tioner's decision "to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework'." (App. A. at 8, quoting from *Fibreboard Paper Products Corp. v. NLRB, supra.*)

SUMMARY OF ARGUMENTS

I. The National Labor Relations Board and the court below have ordered an erroneous and unjustifiable expansion of management's obligation to bargain collectively over a decision to close a financially unprofitable portion of its operations. This expansion is in express contradiction to the language and the history of the Act, and to the decision of this Honorable Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and contravenes the great weight of judicial authority on the subject.

The subject matter at issue in the instant case, a managerial decision to terminate an unprofitable portion of a company's business operation, does not fail within the literal ambit of the term "wages, hours and other terms and conditions of employment." An analysis of the legislative history of the Act clearly reveals that Congress intended that this term be narrowly and literally construed. The congressional intent was to preclude each party to negotiations from interfering with the internal affairs and prerogatives of the other party. Moreover, the term "wages, hours and other terms and conditions of employment" has been construed by this Honorable Court to be words of "limitation". *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

II. This Honorable Court addressed the issue of the scope of management's duty to bargain collectively in *Fibreboard.* Writing for the Court, Mr. Chief Justice Warren held that a subject will be deemed a mandatory subject for bargaining if:

— Mandatory bargaining effectuates the purpose of the Act;

— A review of existing industrial bargaining practices illustrates the propriety of including a particular subject within the scope of mandatory bargaining; and

— The facts of the particular case demonstrate the propriety of submitting the dispute to collective bargaining.

In the absence of the aforesaid factors and in the absence of union animus, a decision to close an economically unprofitable portion of a business falls exclusively within the entrepreneurial prerogative of management.

In the case at bar, petitioner respectfully submits that all the factors enumerated by this Honorable Court in *Fibreboard* militate against a duty to bargain.

The imposition of a duty to negotiate over the decision to discontinue a financially unprofitable portion of a business would not effectuate the purposes of the National Labor Relations Act. The Act was designed to protect the free flow of interstate commerce by minimizing undue disruption caused by labor disputes. A requirement to bargain over a decision to close part of a business would unduly disrupt commerce by legitimizing strike activity in support of the union's negotiating position and by hastening the functional collapse of the operation in question through loss of secrecy with concomitant impact on key personnel, suppliers and customers.

Existing industrial practice does not illustrate the propriety of subjecting a managerial decision to close an unprofitable portion of a business to collective bargaining. An analysis of both official U.S. government and private sector surveys of collective bargaining agreements reveal that only a tiny percentage (approximately 3%) of all labor agreements surveyed mandate bargaining over a decision to close. Therefore, the overwhelming majority of labor contracts have excluded decisions to close part of a business as a subject of negotiations.

Finally, the facts of the case at bar do not in any way warrant the imposition of a bargaining obligation. It is undis-

puted that the decision to close the Greenpark facility was totally unrelated to labor costs. There was no history of the company and the unions which represented its employees ever attempting to resolve problems of this nature by means of negotiation. Most importantly, the decision to discontinue the Greenpart operation substantially altered the company's basic direction and dictated a major change in the allocation of its resources.

III. It is respectfully submitted that the Court of Appeals for the Second Circuit misconstrued the decision of this Honorable Court in *Fibreboard* and erroneously expanded the scope of mandatory negotiations in the case at bar. When viewed in its proper context, the *Fibreboard* rationale operates to reserve to management those decisions lying at the "core" of entrepreneurial discretion and control. This interpretation has been embraced by the vast majority of circuits which have addressed the issue.

ARGUMENT

I.

THE N.L.R.A. DOES NOT REQUIRE AN EMPLOYER TO BARGAIN WITH THE UNION ABOUT THE EMPLOYER'S DECISION TO DISCONTINUE PART OF A BUSINESS SOLELY FOR ECONOMIC REASONS.

A. *The Language of The Statute and its Legislative History*

The National Labor Relations Board, pursuant to its statutory authority to investigate, to rule upon and to prevent the commission of unfair labor practices,[5] was granted the responsibility, subject only to limited judicial review, of determining which matters must be discussed within the dynamics of the collective bargaining process as mandatory subjects of bargaining, which subjects may be discussed on a voluntary basis as

---

5 Section 10 of the Wagner Act, 49 Stat. 453 (1935), presently 29 U.S.C. § 160.

permissive subjects of bargaining, and which subjects, because of basic questions of illegality or public policy, are prohibited as subjects of collective bargaining and are thus removed from the negotiating arena.[6]

The legislative history of Section 8(d) of the Act does not dispositively assist in the identification of those subjects which fall within the parameters of the statutory definition of "wages, hours, and other terms and conditions of employment." In considering the formulation of Section 8(d), Congress apparently rejected the House version of the bill,[7] which had enumerated a precise list of subjects for mandatory bargaining and expressly states that parties need not discuss any other subjects.[8] The House was concerned that the N.L.R.B. might overextend its legislative mandate in attempting to control the terms of collective bargaining.[9] This concern was

---

6 While the Wagner Act did not explicitly confer this power upon the N.L.R.B., the implied authority is predicated upon the Board's Section 10 (29 U.S.C. § 160) responsibility to prevent parties from engaging in unfair labor practices.

It was this Court's decision in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) which clarified the then existing conflict between the N.L.R.B. and the reviewing circuit courts' construction of the range of subjects which come within the statutory phase. In *Borg-Warner*, this Court came to providently demarcate the three categories of bargaining proposals—mandatory subjects, permissive (or voluntary) subjects, and illegal subjects—and established rules for each.

7 *See* 93 Cong. Rec. 5298 (1947).

8 The House bill stated that neither party would be required to discuss any subject matter other than (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, layoff, recall, seniority, discipline, promotion, demotion transfer and assignment with the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects. See H.R. Rep. No. 3020, 80th Cong., 1st Sess., § 101(2)(11) (1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 166-67 (1974).

9 See H.R. Rep. No. 245, 80th Cong., 1st Sess. 20 (1947) reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RE-

premised on the assumption that is revisited in the instant case, namely, that neither party has a right to bargain with regard to the internal affairs of the other.[10] The final bill ultimately did not contain explicit restrictions on subjects suitable for the collective bargaining process, but instead adopted the flexible and imprecise terminology "wages, hours and other terms and conditions of employment."[11]

A restrained approach was embraced by the federal judiciary in the interpretation of this language. A major case illustrating in this concept was *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), which involved an employer's managerial decision to close one plant of a multi-plant operation and transfer its work to a second plant. The second circuit held that the decision "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion." 293 F.2d at 176.

LATIONS ACT, 1947, at 311 (1974). The report stated: "Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." *Id.*

10 See id. at 22-23, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 313-14 (1974). In its Report, the House stated:

> Just as the employer has no right to bargain about who the union's officers and representatives will be, what dues and assessments it shall impose, how it shall spend its money or otherwise conduct its internal affairs so long as they do not affect the employer's operations, so the union has no right to bargain with the employer about who his agents will be, what prices he will charge, what his profits shall be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act.

11 See National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976). While the final bill utilized the language suggested by the Senate conferees', *see* S. 1126, 80th Cong., 1st Sess. § 8(d) (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 14-15 (1974), the legislative history contains no discussion of the Senate's interpretation of that language. This Court last reviewed, in some detail, the statutory phraseology's legislative history and intended import in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

The trend in administrative and judicial moderation in the construction of the phrase "wages, hours and other terms and conditions of employment" was subsequently affected by the decision of this Honorable Court in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964).

B. *Fibreboard* and *Darlington*

Fibreboard Paper Products Corp. v. NLRB, supra, is the landmark case in the area of management's obligation to bargain collectively. As such, it has aroused much controversy among judges, practitioners and scholars.

The facts of the *Fibreboard* case seem deceptively simple. The maintenance employees at the employer's Emeryville, California facility constituted a separate unit for purposes of collective bargaining and were represented by a union which had negotiated a series of agreements on their behalf. Shortly before the expiration date of the last of these agreements, the union requested negotiations with the employer in order to obtain a successor contract. The union was informed by the company that bargaining would be pointless because management had decided to contract out all the maintenance work in the plant. This unilateral step was taken by management in order to control the costs of its maintenance operation. The contractor had assured the company that costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by pre-planning and scheduling the services to be performed. No negotiations took place subsequent to the decision to contract out the work and the employer's indigenous maintenance workers were terminated.

This Honorable Court held that the employer had violated § 8(a)(5) of the Act. Mr. Chief Justice Warren delivered the opinion of this Honorable Court. The Court noted that the decision to contract out did not alter the company's basic operation or its investment of capital. The same work was still being performed, although by employees of an independent contractor. Therefore, to require the employer to bargain

about the matter would not significantly abridge its freedom to manage its business. In addition, the Court found that, since the company acted out of concern for labor-related costs, the dispute was one particularly suitable for resolution within the collective bargaining framework.[12]

It should be noted that *Fibreboard* dealt with situations where the employer was not motivated by union animus. In a later decision, *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), this Honorable Court held that an employer, even if motivated by union animus, could lawfully close a portion of its enterprise if, in so doing, it was not seeking to "chill unionism" in the remaining portions of the enterprise and such a result could not reasonably have been foreseen to have that effect. 380 U.S. at 275.*

Succinctly summarizing the narrow holding and cautious thrust of the Court's opinion in *Fibreboard,* Chief Justice Warren announced:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). (379 U.S. 215).

---

12 *Fibreboard Paper Products Corp.*, 130 N.L.R.B. 1558, 1559-60 (1961). The NLRB distinguished prior case law, stating:

> None of the obligations heretofore imposed with respect to (termination rights) concern . . . the question whether . . . termination will occur; all . . . are concerned solely with such matters as selection for termination among present employees, and benefits flowing from present employment which employees may be entitled to receive at the time of or following the termination of employment.

* The Petitioner joins in without repeating the arguments of *Amicus Curiae*, the Chamber of Commerce of the United States, regarding the impact of *Darlington* on the case at bar.

Then, addressing more basic concerns (for the N.L.R.B. majority had painted with a "broad brush" apparently in *per se* terms, rather than narrowly delimiting its result as did this Court),[13] Mr. Chief Justice Warren warned:

> Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy. (Id. at 316)

Mr. Justice Stewart, joined by Mr. Justice Douglas and Mr. Justice Harlan, in a concurring opinion wrote that *Fibreboard* "most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty." *Id.* at 218. Further, as the concurring Justices noted:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest

---

13 This "broad brush" approach, first plainly taken in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), represented a marked departure from the Board's earlier-held view that an employer could lawfully discontinue, reduce, or change its method of operation for any reason, provided only that such a decision was not motivated by a desire to interfere with or to defeat its employees' union activities. *See J.E. Cote*, 101 N.L.R.B. 1486, 1507 (1952); *Krantz Wire & Manufacturing Co.*, 97 N.L.R.B. 971, 988 (1952); *Walter Holm & Co.*, 87 N.L.R.B. 1169, 1172 (1949); *Auto Stone Works*, 81 N.L.R.B., 1203, 1220-21 (1949); *Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945). Indeed, the Board's 1952 statement in *Krantz Wire & Manufacturing Co., supra*, was quite different from the position it took here:

> An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. *When he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a pre-requisite to going out of business.* (97 N.L.R.B. at 988; *emphasis added*).

> in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.* at 223.]

The limited holding of *Fibreboard* was carefully drafted to discourage extension of the duty to bargain into core areas of entrepreneurial decision-making.

II

APPLICATION OF THE PRINCIPLES ADOPTED BY THIS COURT IN *FIBREBOARD* WARRANTS REVERSAL IN THE INSTANT CASE

While this Honorable Court carefully confined its *Fibreboard* decision to the narrow and specific facts of the case, it nevertheless provided a mode of analysis that should lead to reversal of the decision below.

A. A Literal Approach to Bargainability Determinations Involving Closings of a Facility in Whole or In Part Should be Rejected.

The analysis starts with the principle that the phrase "wages, hours and other terms and conditions of employment" was intended to limit those matters upon which an employer must bargain. No such limitation was included in the Wagner Act. Restriction of mandatory bargaining to "wages, hours and other term and condition of employment" was the product of the Taft-Hartley amendments adopted by the 80th Congress in 1947. As this Honorable Court concluded in the *American*

Insurance case,[14] "The duty [to bargain] is limited to those subjects. . . ." (343 U.S. 395). This principle was recognized and reiterated in both the *Fibreboard* majority and concurring opinions. (379 U.S. at 211, 221).

Given those words of limitation, this Honorable Court's analysis in this case cannot begin and end with a literal application of the phrase "other terms and conditions of employment" any more than it did in *Fibreboard.* Otherwise, almost any unilateral management decision that resulted in termination of employment would automatically be a mandatory subject for negotiations with all which that implies in terms of protected economic activity, a result that most certainly must be rejected upon any reading of *Fibreboard.* Fairly viewed, both *Fibreboard* opinions sought to avoid just such an end by limiting the decision to its facts and by eschewing a "broad brush" rationale that could be read so as to mandate vast extensions of such bargaining into other areas, thus permitting it to impinge upon core areas of entrepreneurial concern.

Having rejected a literal approach to the issue (indeed, the type of mechanistic one subsequently adopted by the Board in partial closing cases[15]), the Court proceeded to resolve the

---

14 *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

15 Despite the limited thrust of the *Fibreboard* opinions in this Honorable Court (as opposed to that of the Board majority in that very case), the National Labor Relations Board has since applied a *per se* rule, known as the *"Ozark Trailers"* doctrine, requiring employers to bargain about economically motivated decisions to terminate a portion of an enterprise that does not encompass an entire discrete line of business. The rule is applied whether the terminated portion is a manufacturing facility or service operation and irrespective of the wisdom of the decision in terms of efficient allocation of resources of the enterprise. *See e.g., National Family Opinion, Inc.*, 246 N.L.R.B. No. 84 (1979) (closing and contracting out of printing operations by survey research organization); *Lauer's Furniture Stores, Inc.*, 246 N.L.R.B. No. 58 (1979) (closing of subsidiary on verge of bankruptcy followed by sale of all stock); *North Carolina Coastal Motor Lines, Inc.*, 219 N.L.R.B. 1009, 1014 (1975), *enforced on other grounds*, 542 F.2d 637 (4th Cir. 1976) (decision to phase out uneconomical portion of

issue—not by virtue of a presumption favoring mandatory bargaining because bargaining unit employment had been terminated—but rather, by a careful balancing of three crucial factors:

1. Whether mandatory bargaining "seems well designed to effectuate the purpose of the National Labor Relations Act . . ." (379 U.S. at 210-11);

2. A "review of industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining" (379 U.S. at 211);

3. Whether the facts of the particular case illustrate the propriety of submitting the dispute to collective negotiations (379 U.S. at 213).

In the circumstances present here (involving far more than an in-plant substitution of a maintenance contractor's employees for those for the bargaining unit in order to save on wages, fringes, and to eliminate non-productive practices), an analysis of all three of these factors as applied to the instant case support the conclusion that the decision in issue is not a mandatory subject for bargaining.

---

trucking operations); *Pine Valley Div. of Ethan Allen, Inc.*, 218 N.L.R.B. 208, 220 (1975) (shutdown of some plant operations); *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. 591, 597 (1969), *enforcement denied*, 431 F.2d 234 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267, 1268 (1964), *enforcement denied*, 346 F.2d 897 (8th Cir. 1968) (termination of last security service in one market). *But see, Brockway Motor Trucks, Div. of Mack Truck, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB*, 382 F.2d 720 (3d Cir. 1979) (where total liquidation not contemplated at time of decision to close single facility, economic justification for not bargaining held insufficient), *appeal pending*.

1. To Require An Employer to Bargain With A Union Regarding Its Economically Motivated Business Decision to Close a Portion of Its Business Does Not Effectuate The Purposes of the National Labor Relations Act.

While one of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management differences to collective bargaining, it is respectfully submitted that a central theme of the National Labor Relations Act is that by recognizing the legitimate rights of both labor and management a free flow of commerce without undue disruption is promoted. Section 1(a) of that statute explicitly states that "[i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other. . . ."

Far more, we submit, is at stake here than the delay in effectuating an employers decision to close its facility which may occur if such closure is subject to mandatory bargaining. Such delay may lead to increased losses compounded by interim departure of key personnel; declining productivity on account of reduced morale; security problems and perhaps sabotage while a confrontation ensues at the bargaining table.

If the decision to close a portion of the business is a mandatory subject of bargaining, absent a "no-strike" clause in an existing collective bargaining agreement, as in the case at bar, employees have a protected right to strike in support of their positions in opposition thereto.

The use of such economic pressure "is part and parcel of the process of collective bargaining." *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 495 (1960). With partial discontinuances encompassed within the ambit of mandatory bargaining, unions would be free to seek coerced continuation of operations both by striking the facility directly involved or by picketing or striking other installations of the same em-

ployer, thus provoking sympathy strikes which are themselves protected concerted activities in the absence of explicit contractual proscription not encompassed within the usual "no-strike", "no-lockout" provisions and which are, regardless, not subject to injunction process when conducted peacefully. *See, e.g., Buffalo Forge Co. v. USW,* 428 U.S. 397, 404 (1976); *Gary-Hobart Water Corp.,* 210 N.L.R.B. 742 (1974), *enf'd.,* 511 F. 2d 284 (7th Cir. 1975), 39 Ann. Bd. Rep. at 80 (1974); Arthur B. Smith, *The Supreme Court, The Boys Markets Labor Injunctions & Sympathy Work Stoppages,* 44 U.Ch. Rev. 321 (1976).

All this is so even when a union perceives no rational economic alternative to the partial closing decision. Once a subject is labeled "mandatory" "neither party is legally obligated to yield." *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952). In these circumstances, a strike may "convince" the employer to continue an uneconomic or marginally profitable activity, foregoing superior or more rational allocation of the affected resources to avoid losses from economic pressure on its more profitable operations.[16]

The reality of this possibility was cogently noted in Board Member Rodgers' terse comments in *Fibreboard,* where he dissented from his colleagues' conclusion (which was subsequently modified by this Honorable Court) that subcontracting is a mandatory subject of bargaining:

> To be sure, in describing what is required by business management in such circumstances as these, my colleagues have sought to soften the impact of their ruling by such statements as the following: 'This obligation to bargain *in no wise restrains an employer* from . . . effectuating an economic decision to terminate a phase of his business operations . . . [a] prior discussion with a duly designated bargaining representative is all that the Act contemplates. [*Emphasis supplied.*]

---

16 It is submitted that although this did not happen in the instant case, the possibility always exists in situations of this type.

> If the foregoing social niceties represented all that is involved, one could not object. But the fact remains that by making mandatory rather than permissive bargaining, my colleagues have, as they well know, thrust the entire question squarely into the arena of economic struggle and industrial turmoil where strikes, picket lines, charges, countercharges, protracted litigation, and many other aspects of economic power possessed by a union are 'protected' by this Board and are, therefore, legally available to a union to compel a complete abandonment by management of its proposal, on pain of suffering irreparable damage to every aspect of its business. That such a power, in pursuit of mandatory bargaining objectives, is effectively employed by many modern unions is manifest in countless cases which come to public attention and to the attention of this tribunal day by day.

See also, Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. Rev. 1089, 1091 (1967). See to same effect Justice Stewart's *Fibreboard* concurrence.

2. Existing Industrial Bargaining Practices Do Not Support A Mandatory Bargaining Obligation Where A Facility Is Being Closed as a Result of An Employer's Economically-Motivated Decision.

Since parties include permissive subjects as well as mandatory subjects in their contracts without converting such subjects into mandatory subjects of bargaining[17] a review of generally available pertinent materials* shows that only a miniscule proportion of major collective agreements contain any provisions restricting an employer's right to discontinue a portion of his business and that very few even provide for advance notice of such decisions and union participation

---

17 *Fibreboard, supra,* 379 U.S. at 211.

* See nn.19 & 20, *infra.*

therein.[18] Even then, this small number includes restrictions on the right to relocate in an apparent effort of the union to avoid "runaway" shops, and to preserve employment rights at the new location.

In a 1969 Department of Labor study entitled *Major Collective Bargaining Agreements—Plant Movement, Transfer, and Relocation Allowances*[19] the Bureau of Labor Statistics ("BLS") examined 1,823 agreements (each encompassing a bargaining unit of more than 1,000 employees) covering over seven million workers in more than 30 industries, including both manufacturing and non-manufacturing categories, the latter purporting to encompass, among other things, various service occupations. Sixty-five agreements covering about 258,000 employees in service fields were included in the study.

Of the 1,823 agreements, only 60 (or 3.3%) included provisions providing for notice of, union participation in, or limitation or prohibition of the decision to close *or* to relocate a plant or other operation. (BLS-A at 22). Of these 60 agreements, only 8 involved non-manufacturing contracts which numbered 775 out of the 1,823 agreements included in the study. *(Id.* at 27, 38). The 8 agreements equalled 1.03% of those contracts. Not included in these figures (and separate in the study) were 332 other agreements establishing notice requirements and other obligations in connection with the effect of decisions to close or relocate. (*Id.* at 22-37, 38). These contracts amounted to 18.2% of the total number of agreements studied and were five times more frequent than clauses

---

18 "But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis." *Fibreboard supra,* 379 U.S. at 220. *See also Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

19 U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969). The relevant portions of this study are appended to this brief and are cited as "BLS-A".

requiring notice of, union participation in or prohibition of the decisions themselves.

Of the 60 agreements pertaining to the decisions to close or relocate (rather than their effects), 46 were simply notice provisions. The remaining 14 "assigned a more active role to the union." (*Id.* at 27). Three of the 14 "required a discussion between the union and the employer." (*Id.*). The other 11 (10 of which were in the apparel industry and 1 in leather goods) "require[d] the consent of the union prior to an employer's relocating the plant or constructing additional facilities." (*Id.* at 8.)[20]

The BLS apparently has not published any more recent data updating the 1969 study described above. In 1980, however, in an omnibus compilation entitled *Characteristics of Major Collective Bargaining Agreements, January 1, 1978,*[21] the BLS included data pertaining to advance notice clauses by industry. These provisions applied to layoffs, plant shutdowns or relocations, and technological changes embodied in 1,536 agreements covering 7,054,550 workers in units of 1,000 employees or more. (BLS-B at 42.) No distinction was drawn whether the advance notice clauses tallied by the BLS actually applied to the decision involved or to the effect thereof and, once again, plant shutdowns and relocations were grouped under one heading. Even when so grouped, contracts with such provisions numbered only 160 out of the 1,536 surveyed, or 10.4 percent. Only five of the 71 agreements in the "services" field had such clauses, or about 7 percent. (*Id.*).

Similar results were produced by another recent survey entitled Bureau of National Affairs, *Basic Patterns: Management and Union Rights,* Collective Bargaining Negotiations and Contracts § 65:1 (1979). There, management rights clauses

---

20 U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980), cited as "BLS-B".

21 The pertinent sections referred to in the text address themselves to facility relocation.

in a sample of 400 collective agreements were analyzed. Provisions in 52 agreements (13 percent of the sample) dealt with plant shutdowns or relocations, with no line drawn by the editors between shutdowns and relocations or between the decisions and their effects. Commenting on these 52 contracts the BNA stated:

> In 44 percent of these agreements, the displaced employee has transfer rights to a new location and in 24 percent the company is required to pay at least a portion of the employee's moving costs. Advance discussion with the union is required in 14 percent of the [52] agreements [*i.e.* 7 contracts] dealing with the subject. (*Id.* at 65:3-4.).

Such survey suggests that the incidence of labor-management inclusion of a provision requiring an employer to bargain over its decision to close or relocate a facility is too statistically infrequent for the NLRB to reasonably mandate such decisional bargaining on a national basis.[22]

In *Fibreboard,* referring to a BLS study that showed that about 25 percent of some 1,687 collective agreements "contained some form of a limitation on subcontracting", (379 U.S. at 212 n.7),[23] the Court noted:

> Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. (*Id.* at 211).[24]

---

22 *See,* Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc., §§ 65:1-65:6, No. 879 (1979).

23 That study itself commented that "[n]umerous clauses allowed the union to participate in the making of subcontracting decisions." 84 Monthly Labor Rev. 579, 583 (1961).

24 Indeed, since *Fibreboard,* a later version of the BLS study that was relied on by the Court has been issued. It shows that as of 1965-66 subcontracting limitations had increased to 43.9 percent of the contracts sampled. See U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-8, *Major Collective Bargaining Agreements—Subcontracting* (1969).

No such conclusion can properly be drawn from the facts presented here. Indeed, if anything, they indicate that "experience illustrates" that the industrial relations community has not brought the decision to close a plant or service operation for economic reasons widely within the ambit of collective bargaining. Indeed, the tiny number of agreements that pertain to such decisions tend, if anything, to demonstrate, based on industrial experience, that the subject is permissive rather than mandatory.

3. The Facts of This Case Lead To The Conclusion That Mandatory Bargaining is Inappropriate

In *Fibreboard,* the Court noted that the facts of that case "illustrate[d] the propriety of submitting the dispute to collective bargaining." (379 U.S. at 213). Similar considerations do not apply here.

First, Fibreboard "was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments", all "long . . . regarded as matters peculiarly suitable for resolution within the collective bargaining framework." (*Id.* at 213-14).

In the instant case, First National Maintenance's decision to abandon the Greenpark operation had nothing to do with labor costs. Its contract with the home was "cost plus"; that is, First National Maintenance was reimbursed for wages, fringes and the like and received $250 each month to administer, supervise and maintain a cleaning staff of 35 at that location. The fee had been $500 a month but was reduced to $250, and the company simply could not get its customer, Greenpark, to agree to an increase. Labor costs, thus, did not cause First National Maintenance to drop Greenpark as a customer. Its withdrawal can in no way be termed an attack on the basic wage structure or attempt to undermine conditions of employment. (*Compare, Fibreboard,* 379 U.S. at 212).

Secondly, there certainly was no showing here, as there was in *Fibreboard,* that other unions in the same facility " 'had joined hands with management in an effort to bring about an economical and efficient operation.' " (379 U.S. at 211). There were no other unions representing First National Maintenance's employees at Greenpark and, in any event, there could be no such showing, for the losses that motivated the employer's discontinuance could not have been alleviated in bargaining under the Act between the only two parties required to do so: District 1199 and First National Maintenance. Greenpark was not a party to a Board-imposed obligation to bargain and would not even waive the 30-day "stay-on" provision in the contract with petitioner—something that might have allowed First National Maintenance to stay on and meet with the union.

Thirdly, abandonment of Greenpark by the company, which serviced less than 5 nursing homes at the time,[25] certainly altered the company's basic operation; there was no simple replacement of bargaining unit personnel with cut rate employees working for a contractor as there was in *Fibreboard,* where everything else remained unchanged.

Moreover, losses incurred in the continued servicing of the Greenpark Center is conceptually identical to the economic factors which motivate management in the context of a plant closing. Whether capital is lost because an uneconomical plant is required to remain open pending negotiations over the decision to close it or a losing service operation must be maintained pending bargaining to impasse is, we submit, a distinction without substance.

---

25 There is no evidence in the record whether First National Maintenance serviced other facilities as well.

III.

THE COURT BELOW HAS MISCONSTRUED THE DECISION OF THIS HONORABLE COURT IN *FIBREBOARD* AND HAS THEREBY ERRONEOUSLY EXPANDED THE SCOPE OF MANAGEMENT'S BARGAINING OBLIGATION

In view of this petitioner, the decision of this Honorable Court in *Fibreboard* was very carefully limited. Mr. Chief Justice Warren repeatedly emphasized that the majority's decision was based on the facts of that particular case. The Court went so far as to state that the decision "need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." (379 U.S. at 216.)

The rationale behind this extraordinarily careful limitation of judicial language is most important. It holds the key to a proper understanding of the scope of management's bargaining obligation.

It must be remembered that, at the time *Fibreboard* was decided by this Honorable Court, judicial opinion was virtually unanimous that fundamental entrepreneurial decisions fell within the sole discretion of management. Mr. Chief Justice Warren was very careful to state that a duty to bargain would be imposed only where that duty would not encroach on management's ability to run its business:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business. (379 U.S. at 215).

In addition, the majority's opinion stressed that the subcontracting was undertaken to reduce the costs of the maintenance operation. A large component of these costs were *labor-related*: the size of the work force, fringe benefits and overtime payments. These were areas, the court held, where existing industrial practice already proved that collective bargaining was both common and effective in resolving disputes.

This Honorable Court took pains to explain that no new inroads were being made at the expense of entrepreneurial prerogatives. Bargaining would only be required in areas that did not in any way obstruct the running of the enterprise and where bargaining was already prevalent.

In essence, this Honorable Court has established its own "initial presumption." A subject which was heretofore within the sole discretion of management and is fundamental to the basic direction of a corporate enterprise is presumed to lie outside the scope of mandatory collective bargaining. This presumption may be rebutted by showing that: 1) the subject would not alter the company's basic operation; 2) allocation of resources and/or capital would not be restricted; 3) the matter would not significantly abridge management's freedom to manage the business; and 4) the matter lies within the literal meaning of the terms "wages, hours and other terms and conditions of employment."

The "initial presumption" established by the Second and Third Circuits is very different from the intent and operation of this Honorable Court's *Fibreboard* decision. In fact, they are exact opposites. The court below held that everything impacting on "wages, hours and other terms and conditions of employment" will be presumed to be a mandatory subject of bargaining unless rebutted.

Obviously reflecting careful thought, the opinion of Judge Lasker began by tracking the several factors, only beginning but certainly not ending with the literal words of Section 8(d), that underlay the decision of the Court (and, still more clearly, the concurrence) in *Fibreboard*. Nevertheless, when it came to

the actual resolution of the problem in this case, the court allowed itself, in our view, to be led astray by narrow and undue focus upon the bare words "terms and conditions of employment."

The partial closing, the court said, "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the *Fibreboard* Court found to fall within the literal meaning of the statute." (App. A at 11).

With that much stated, the court proceeded directly to its "presumption" that this is a mandatory subject of bargaining.

Equally without foundation is the Second Circuit's use of so-called "futility" in its analysis of what might or might not rebut the presumption it established. Such a criteria is simply a "license to speculate" in the light of hindsight about what might or might not have happened in negotiations that never took place.

The danger of such speculation is apparent from the face of the majority opinion below where the court found the presumption unrebutted based in large measure upon the speculation that

> the union might have made concessions by accepting reductions in wages or benefits (take backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to five FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. (*Id.* at 602).

Nothing in the record supports this speculation and it is nothing more than speculation, for:

> Greenpark was in no way obligated to deal with the Union; it was not a joint employer;

Greenpark had no apparent other relationship with that labor organization;

Greenpark was unwilling even to waive the 30 day "stay-on" clause which might have allowed FNM to remain on for a while; and

Greenpark had ample opportunity in negotiations with FNM in June and July to suggest either a reduction in staffing or labor costs.

In these circumstances, the anticipation by the court of appeals of possible concessions by Greenpark that might have allowed petitioner to remain there serves to display the unrealism, and the consequent unsoundness, of the court's rationale.

IV.

A MAJORITY OF THE CIRCUITS HAVE HELD THAT A DECISION TO CLOSE AN ECONOMICALLY UNPROFITABLE PORTION OF A BUSINESS IN THE ABSENCE OF UNION ANIMUS IS NOT A MANDATORY SUBJECT OF NEGOTIATIONS

Despite the abrupt reversal of the NLRB's traditional reluctance to impose a bargaining obligation upon employers concerning fundamental managerial decision-making, the weight of authority in the circuit courts of appeals has been that such decisions are not mandatory subjects for negotiation. The Court of Appeals for the Fourth, Eighth, Ninth and Tenth Circuits have consistently held that there is no duty to bargain over an economically motiviated decision to terminate a portion of the business enterprise in the absence of union animus. On the other hand, the Courts of Appeals for the Second and Third Circuits have held that there is an "initial presumption" in favor of the duty to bargain in cases of partial closings for economic reasons. All the circuits are unanimous in rejecting the NLRB's *per se* approach.

The Court of Appeals for the Eighth Circuit, squarely at odds with the positions adopted by the Second and Third Circuits, has repeatedly found no duty to bargain over partial closings decisions, whether the terminated portion is a plant or service operation. This position was most recently and cogently restated in *Royal Typewriter Co. v. NLRB,* 533 F.2d 1030, 1039 (8th Cir. 1976). The circuit court made it clear that it does not adopt the Board's view, which the NLRB has continued to press since its holding in *Ozark Trailers, Inc.,* 161 N.L.R.B. 561, 564-570 (1966), that an employer operating two or more plants is obliged to bargain with respect to a decision to close one of those plants. In that case, the Court stated that:

> . . . . We squarely rejected that holding in *NLRB v. Drapery Manufacturing Co., supra,* 425 F.2d at 1026, 1027-28 and reaffirmed our adherence to the view set forth in *NLRB v. Adams Dairy, Inc.,* 350 F.2d 108, 110-113 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966), that, absent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons. *See also Morrison Cafeterias Consolidated, Inc. v. NLRB,* 431 F.2d 254, 257 (8th Cir. 1970). (533 F.2d at 1039).

In *NLRB v. William J. Burns International Detective Agency, Inc.,* 346 F.2d 897 (8th Cir. 1965), the same rationale was applied to the discontinuance of a service operation. More particularly, the court refused to uphold the Board's ruling that Burns' unilateral decision to terminate its only remaining service contract in Omaha constituted an unlawful refusal to bargain:

> The rationale of *Fibreboard* as applied to the facts of this case does not support the Board's decision. Under *Darlington,* the finding of lack of anti-union motivation in closing the Omaha Division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the union on the cancellation of the

Creighton contract and the closing of the Omaha Division. (346 F.2d at 902).

The Fourth Circuit has adopted a substantially similar position, refusing to find a violation of § 8(a)(5) where the employer's decision to close a portion of its business is not motivated by union animus constituting a violation of § 8(a)(3) under *Darlington*. In *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. ¶11,615, *reported without published opinion*, 541 F.2d 277 (4th Cir. 1978), the court held that an employer "ha(d) not abrogated its bargaining obligations" where there was no substantial evidence of anti-union motivation and "(t)he company's representative testified without contradiction that for almost two years before finally writing off this portion of its organization, the employer had considered the total cancellation of it because dissatisfied with the profits . . ." 79 Lab. Cas. at 21, 635-36; *Accord, NLRB v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976).

In similar fashion, the Tenth Circuit, citing *Darlington*, has held that a company "solely motivated by a sound economic reason, ha(s) no duty to bargain on the decision" to close a portion of its business. *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969). The Court also cited with approval the decision of the Ninth Circuit in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967), which held:[26]

---

26 *See, e.g., Metro Transp. Servs. Co.*, 218 N.L.R.B. 534, 536 (1975) (closing of one of two local pickup and delivery service operation); *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. 591, 595-97 (1969), *enforcement denied*, 431 F.2d 254 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency Inc.*, 148 N.L.R.B. 1267, 1268 (1964), *enforcement denied*, 346 F.2d 897 (8th Cir. 1965) (termination of last security services contract in one market). *Cf. Empire Dental Co.*, 211 N.L.R.B. 860, 866-68 (1974) (closing of in-house dental clinic laboratory followed by contracting out of laboratory work). *But see Brockway Motor Trucks, Div. of Mack Trucks, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB, supra*, 582 F.2d 720 (3rd Cir. 1978) (where total liquidation not contemplated at time of decision to close single facility,

> A company's decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner is not a subject of mandatory collective bargaining within the meaning of § 8(a)(5). *A decision of such fundamental importance to the basic direction of the corporate enterprise is not included within the area of mandatory collective bargaining.* (380 F.2d at 939; *emphasis added*)

In a compelling recent decision styled *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980), the Ninth Circuit faced the precise question presently before this Honorable Court, unanimously holding that the managerial decision to alter the employer's marketing structure and to close one of its facilities, absent anti-union motivation, was within the prerogative of management, irrespective of the loss of bargaining unit jobs that would result from the business judgment. The Ninth Circuit did enforce that portion of the NLRB's order (as did the dissent below) which directed the employer to bargain with the union concerning the effects of the decision to terminate its operations at that particular business facility.

In *NLRB v. Iron Workers,* 434 U.S. 335, 360 (1978), the Ninth Circuit Court of Appeals, despite its recognition of this Honorable Court's consistent policy of deferring to the NLRB whenever possible, held:

> . . . . nevertheless, we conclude that the Board misapplied the law in determining that International Harvester's decision was subject to mandatory bargaining. . . . A company must bargain in good faith over management decisions affecting terms and conditions of employment *(citation omitted)* . . . [M]anagement decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital are generally not consid-

---

economic justification for not bargaining held insufficient), *appeal pending.*

ered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining. *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. at 223 (Stewart, concurring); *NLRB v. Transmarine Navigating Corp.,* 360 F.2d 933 (9th Cir. 1967).

Thus, it can be clearly seen that the Fourth, Eighth, Ninth and Tenth Circuits adhere to the traditional and restrictive position concerning a mandatory duty to bargain over managerial decision making.

On the other hand, the Second and Third Circuits, by divided courts, have followed a different path: an "initial presumption in favor of bargaining."

In 1978, the Court of Appeals for the Third Circuit announced its decision in *Brockway Motor Trucks v. NLRB,* 582 F.2d 720 (3d Cir. 1978). In that case, the employer decided to close one of its plants on economic grounds without notifying or bargaining with the affected union. No union animus was found. The court, over a very vigorous dissent, held that there is an "initial presumption" that a partial closing is a mandatory subject of bargaining under the Act. The presumption may be rebutted if the employer can prove that its interest in expeditiously implementing its decision outweighs the interests of the employees in attempting to preserve their jobs: a "comparative harm" test. Judge Rosenn based his dissent on three major points: (1) the majority has fashioned a new rule of law out of whole cloth in total disregard of a vast body of precedent; (2) inadequate consideration was given to the important interests of the employer; and (3) the majority's new rule is impractical as well as untenable and would require constant judicial intervention in the affairs of the parties.

The Third Circuit recently reaffirmed its adherence to the "Brockway Rule" in *Equitable Gas Co. v. NLRB,* _____ F.2d _____ , 106 L.R.R.M. 2201 (3rd Cir. 1981).

The Court of Appeals for the Second Circuit, in the decision below, also opted to create an initial presumption of bargain-

ability in regard to partial closings. In this case, however, the court held that the presumption could be rebutted by showing the purposes of the Act would not be furthered by imposition of a duty to bargain. Judge Kearse, in a well-reasoned dissent, held that neither *Fibreboard* nor any other authority supported creation of the presumption. The dissent also noted that it was uncontroverted that the employer was steadily losing money on the operation it finally terminated and that the decision to close a losing operation is a matter of fundamental entrepreneurial discretion and is not suitable for resolution within the collective bargaining framework.

The imposition of a presumptive duty to bargain with labor would improperly constrict an area of choices "which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp. v. NLRB, supra,* 379 U.S. at 223 (1964). In this petitioner's view, the presumptive bargaining obligation imposed upon employers and urged only by the divided court below and the split Third Circuit Court of Appeals[27] would not further the avowed purposes of the Act to insure the free and unimpeded flow of interstate commerce.

---

27 Section 1 of the National Labor Relations Act, as amended 29 U.S.C. § 141, provides, in pertinent part:

> . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit in the instant matter should be reversed and the order of the National Labor Relations Board should be denied enforcement.

Respectfully submitted,

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
PERRY S. HEIDECKER

MILMAN, NANESS & POLLACK
1175 West Broadway
Hewlett, New York 11557
(516) 569-1288

Attorneys for Petitioner

No. 80-544

FILED
MAR 31 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. McCREE, JR.
Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN H. FERGUSON
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly concluded that petitioner's refusal to bargain with the Union about petitioner's decision to close a portion of its operation and to discharge the employees in that portion of its operation violated Section 8(a)(5) and (1) of the National Labor Relations Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	8
Argument	12
I. The National Labor Relations Act obligates an employer to bargain with the employees' union representative about an economic decision to close part of its operation absent circumstances showing that bargaining would have been futile or would have significantly interfered with the employer's right to manage its business	12
A. The language and the purpose of the Act, as well as the lessons of industrial practice, support the Board's conclusion that, as a general rule, the partial closing of a business operation is a mandatory subject of bargaining	17
B. The Board's conclusion that a decision to close part of an operation is ordinarily a mandatory bargaining subject is further supported by this Court's decision in *Railroad Telegraphers*	30
C. The Board's conclusion is not inconsistent with this Court's decision in *Darlington*	33
II. On the facts of this case, the Board properly concluded that petitioner was required to bargain with the Union over its decision to terminate its Greenpark operation	37
Conclusion	42

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases: Page

ABC Trans-National Transport, Inc., 247 N.L.R.B. No. 25, 103 L.R.R.M. 1116 (Jan. 11, 1980), aff'd on merits but remanded for reconsideration of remedy, No. 80-1115 (3d Cir. Feb. 19, 1981) 26
Brockway Motor Trucks, 230 N.L.R.B. 1002, enforcement denied and case remanded for additional evidence, 582 F.2d 720, reaff'd on remand, 251 N.L.R.B. No. 23, 104 L.R.R.M. 1515 (Aug. 11, 1980), petition to review, No. 80-2327 (3d Cir., filed Sept. 19, 1980) 6, 17, 19, 20, 26, 28, 29, 35
Brooks-Scanlon, Inc., 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606 (Nov. 16, 1979) 26, 38
Detroit Edison Co. v. *NLRB*, 440 U.S. 301 40
East Bay Union of Machinists, Local 1304 v. *NLRB*, 322 F.2d 411, aff'd *sub nom. Fibreboard Paper Products* v. *NLRB*, 379 U.S. 203 37
Electrical Products Div. of Midland-Ross Corp., 239 N.L.R.B. 323, enforced, 617 F.2d 977, cert. denied, No. 80-67 (Oct. 6, 1980) 26
Electrical Workers v. *NLRB*, 366 U.S. 667 15
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 .....*passim*
Ford Motor Co. v. *NLRB*, 441 U.S. 488 14
General Motors Corp., 191 N.L.R.B. 951, aff'd, 470 F.2d 422 ..... 27, 40
Inland Steel Co. v. *NLRB*, 170 F.2d 247, cert. denied, 336 U.S. 960 32-33
Int'l Ass'n of Machinists and Aerospace Workers v. *Northeast Airlines, Inc.*, 473 F.2d 549, cert. denied, 409 U.S. 845 39
Krantz Wire & Mfg. Co., 97 N.L.R.B. 971, enforced on other grounds *sub nom. NLRB* v. *Armato*, 199 F.2d 800 41
McLoughlin Mfg. Corp., 164 N.L.R.B. 140, supplemental decision after remand, 182 N.L.R.B. 958, enforced, 463 F.2d 907 23
Merryweather Optical Co., 240 N.L.R.B. 1213..... 41
National Car Rental System, Inc., 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263 (Sept. 16, 1980)..... 40

Cases—Continued — Page

NLRB v. *Burns Internat'l Detective Agency, Inc.*, 346 F.2d 897 40
NLRB v. *Drapery Mfg. Co.*, 425 F.2d 1026 41
NLRB v. *Insurance Agents' Internat'l Union*, 361 U.S. 477 19
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1.. 18-19
NLRB v. *Katz*, 369 U.S. 736 38
NLRB v. *Royal Plating & Polishing Co.*, 350 F.2d 191 38
NLRB v. *Thompson Transport Co.*, 406 F.2d 698.. 39
NLRB v. *Transmarine Navigation Corp.*, 380 F.2d 933 39
NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149 21
NLRB v. *Weingarten*, 420 U.S. 251 15
NLRB v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 14
National Terminal Baking Corp., 190 N.L.R.B. 465 39
Order of Railroad Telegraphers v. *Chicago & N.W. Ry.*, 362 U.S. 300 ..... 10, 30, 31-32
Ozark Trailers, Inc., 161 N.L.R.B. 561 ..... 19, 26, 29-30, 36, 38
Production Molded Plastics, Inc., 227 N.L.R.B. 776, enforced, 604 F.2d 451 23
Raskin Packing Co., 246 N.L.R.B. No. 15, 102 L.R.R.M. 1489 (Oct. 15, 1979) 26, 39
Shell Oil Co., 149 N.L.R.B. 305 29
Sucesion Mario Mercado E Hijos d/b/a Central Rufina, 161 N.L.R.B. 696 27
Summit Tooling Co., 195 N.L.R.B. 479, enforced on other grounds, 474 F.2d 1352 ..... 26, 41
Textile Workers Union v. *Darlington Mfg. Co.*, 380 U.S. 263 ..... 11, 33, 34, 35, 36
Thompson Transport Co., 165 N.L.R.B. 746, enforcement denied in part, 406 F.2d 698 23
Westinghouse Electric Corporation (Mansfield Plant), 150 N.L.R.B. 1574 27
Winn-Dixie Stores, Inc., 147 N.L.R.B. 788, enforced in pertinent part, 361 F.2d 512, cert. denied, 385 U.S. 935 25-26

Statutes: Page

Labor-Management Relations Act, 29 U.S.C. 141 *et seq.*:
Section 1, 29 U.S.C. 141 18
Section 101, 29 U.S.C. 151 18
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2
Section 1, 29 U.S.C. 151 13
Section 2(9), 29 U.S.C. 152(9) 33
Section 8(a)(1), 29 U.S.C. 158(a)(1) 6, 7
Section 8(a)(3), 29 U.S.C. 158(a)(3) 11, 33, 34, 35
Section 8(a)(5), 29 U.S.C. 158(a)(5) ..... *passim*
Section 8(d), 29 U.S.C. 158(d) 8, 13, 14, 16, 25, 27, 32
Section 9(a), 29 U.S.C. 159(a) 8, 13
Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* 31
Section 4, 29 U.S.C. 104 31
Section 13(c), 29 U.S.C. 113(c) 10, 31
49 Stat. 453 13
61 Stat. 142 13

Miscellaneous:

Bitter Choice: Some Workers Accept Pay Cuts as Alternative to Losing their Jobs, Wall St. J., July 23, 1971 21
BNA Daily Lab. Rep. D-1 (Oct. 2, 1980) 22
Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768 (1979) 17, 20, 29
Employee Protection and Community Stabilization Act of 1979: Hearing on S. 1609 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979) 20, 25
Employee Protection and Community Stabilization Act of 1980: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. (1980) 20, 24, 25
Greenberg, *Deviations From Wage-Fringe Standards*, 21 Indus. & Lab. Rel. Rev. 197 (1968) 21

Miscellaneous—Continued Page

Hearings on Plant Closing Problems: Hearings on H.R. 5040 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 2d Sess. (1980) 20, 24, 25
Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations*, 26 Indus. & Lab. Rel. Rev. 956 (1973) 21
Hershey, *Layoff Ahead: How Do Employees Respond?*, 49 Personnel 29 (Nov. 1972) 22
H.R. 5040, 96th Cong., 1st Sess. (1979) 24
H.R. Rep. No. 1147, 74th Cong., 1st Sess. (1935) .. 36
How Cooper Tire Stays Healthy, N.Y. Times, Feb. 2, 1981 21
Now, It's Pay Cuts Instead of Raises, U.S. News & World Report, Feb. 9, 1981 21
'Out of Business': A Plant Shutdown is Always Painful, But it Need Not Be Merciless, Wall St. J., Feb. 28, 1972 22
Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803 (1971) 20-21
Ruben, *Industrial Relations in 1980 Influenced by Inflation and Recession*, 104 Monthly Lab. Rev. 15 (Jan. 1981) 21
S. 1609, 96th Cong., 1st Sess. (1979) 24
S. Rep. No. 573, 74th Cong., 1st Sess. (1935) 33
S. Slichter, J. Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* (1960) 21
A. Slote, *Termination: The Closing of Baker Plant* (1969) 22
Thompson, *How to Avoid People Problems in a Plant Relocation*, 67 Management Rev. 32 (Sept. 1978) 23
Wall St. J., Mar. 4, 1981 21
Wash. Post, Feb. 3, 1981 21
Watson, *A Sensible Approach to Mass Layoffs*, 3 Pub. Personnel Management 233 (1974) 23
E. Whitman & W. Schmidt, *Plant Relocation: A Case History of a Move* (1966) 22

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board are reported at 242 N.L.R.B. No. 72 (Pet. App. 21a-37a).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 6, 1980, and granted on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 38a.

STATEMENT

1. Petitioner, a New York corporation, supplies employees to perform housekeeping and maintenance services at the premises of its various commercial customers. Petitioner hires its own employees and, as their sole employer, trains and supervises them in the performance of the contracted-for services at its customers' premises. During the spring of 1977, petitioner serviced between two and four nursing care institutions, including the Greenpark Care Center in Brooklyn, New York. Petitioner had been under contract with Greenpark since May 3, 1976, and employed approximately 35 employees there. (Pet. App. 28a-29a; A. 24-26, 31, 43-44, 63-64, 84.)[1] Under the contract petitioner supplied only labor and supervision while Greenpark furnished all the equipment, tools, and supplies (A. 43) and determined what equipment, tools, and supplies were necessary (A. 44).[2] The parties' contract required Greenpark to reimburse petitioner for its weekly payroll and fringe benefits for its employees at Greenpark and to pay petitioner a weekly "professional services fee," which initially was set at $500, but was reduced to $250 as of November 1, 1976 (A. 44, 46). The contract also provided for termination by either party upon 30 days' written notice (A. 44).

---

[1] "A." refers to the appendix to the briefs in the court of appeals, copies of which have been lodged with this Court.

[2] Petitioner (Br. 2-3) erroneously states that it supplied tools, equipment, and supplies to Greenpark.

In the latter months of 1976, the Union[3] began an organizing campaign among petitioner's Greenpark employees (A. 123); and in an election conducted by the Board on March 31, 1977, the employees chose the Union as their collective bargaining representative. On May 11 the Board certified the Union as the employees' exclusive bargaining representative. By a July 12, 1977, letter to petitioner, the Union requested a meeting to negotiate a collective bargaining agreement. Petitioner never responded to the Union's letter (Pet. App. 4a, 29a, 31a).

In the interim, petitioner and Greenpark had been experiencing problems in connection with their contract (Pet. App. 31a). In March 1977, Greenpark gave petitioner 30 days' notice of its intent to cancel the contract on the grounds of a "lack of efficiency" of petitioner's maintenance staff, but the parties reached an accommodation and the work continued (Pet. App. 31a; A. 52, 126-128). Thereafter, in April 1977, petitioner told Greenpark that it was losing money on its Greenpark operation and needed an increase in order to be able to continue providing services at Greenpark (A. 71). The parties had several discussions about the matter in April, May, and June; Greenpark took the position that it could not afford an increase because of a recent cutback in Medicaid reimbursement (A. 71-72). On June 30, petitioner requested that its weekly professional services fee be increased $500, and on July 6 petitioner sent Greenpark a mailgram stating that, unless the requested increase were granted, petitioner's services

---

[3] District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

would be discontinued as of August 1, 1977 (Pet. App. 31a; A. 40).[4]

The parties had several further discussions (A. 75). However, petitioner failed to receive the requested increase, and on July 25 it confirmed that it would terminate its services at Greenpark as of August 1, 1977 (Pet. App. 31a; A. 48). Petitioner never notified the Union of the intended closing (Pet. App. 4a, 29a-31a; A. 118).

On July 28, petitioner informed its Greenpark employees that as of July 31 the Greenpark operation would be closed and they would all be discharged (Pet. App. 4a, 29a, 31a). One of the employees then notified the Union of the anticipated closing (A. 117-118). Edward Wecker, the Union's vice-president, immediately telephoned the administrator of Greenpark, who confirmed that petitioner was terminating the contract and discharging the employees (A. 87, 91-92). When Wecker asked if Greenpark itself could retain the employees, the Greenpark administrator told him that the contract between petitioner and Greenpark prohibited Greenpark from hiring any of petitioner's employees for 90 days following termination of the contract (Pet. App. 31a; A. 44, 92-93).

Wecker then telephoned Leonard Marsh, a one-third owner and secretary-treasurer of petitioner, who stated that petitioner was "pulling out" because it was not making enough money. Wecker asked Marsh if he could "hold on a little longer" until the Union and petitioner could meet to discuss "how to keep the people working." Marsh refused, on the ground that, under the contract, petitioner would be required to remain at Greenpark for another full 30 days if it stayed past the notified termination date. Marsh

---

[4] Petitioner characterized the requested increase as being one "in profits per week" (A. 40).

added that, if Wecker could persuade Greenpark to waive the 30-day provision, Marsh "might be able to swing" a discussion with the Union. Wecker inquired about the possibility of petitioner's hiring the employees for its other locations. Marsh responded in the negative. Marsh's response to Wecker's request that petitioner meet with the Union to discuss the matter was that they had "nothing to discuss" (Pet. App. 4a-5a, 29a, 31a-32a).

Thereafter, Wecker had telephone conversations and a meeting with representatives of Greenpark, but they told him that Greenpark could do nothing about petitioner's closing its Greenpark operation and discharging the employees (A. 98-101). On July 31, petitioner discontinued its Greenpark operation and discharged all of its Greenpark employees (Pet. App. 29a). Greenpark secured the services of another maintenance company to do the work (A. 78).

2. Relying in large part (Pet. App. 33a-34a) on this Court's decision in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the administrative law judge rejected petitioner's contention that its decision to close its Greenpark operation was a management prerogative outside the scope of mandatory collective bargaining. The administrative law judge found that "[t]here was no capital involved" when petitioner decided to terminate the Greenpark job, that petitioner's "regular and unusual method of running its affairs" involves initiating and discontinuing work at various customer installations, and that "[t]he closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size" (Pet. App. 33a). In these circumstances, "where it ha[d] not been shown that [petitioner's] decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate

direction of the enterprise,' " the administrative law judge concluded that petitioner had a duty to bargain with the Union about the decision to close the Greenpark operation (*ibid.*, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978)).

The Board upheld the administrative law judge's findings and conclusion that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain about the decision to close the Greenpark portion of its operations and the effects of the closing on the employees (Pet. App. 22a-23a).[5] The Board ordered petitioner, *inter alia*, to bargain with the Union about the decision to terminate the Greenpark operation and the possible resumption of it; if an agreement to resume the Greenpark operation were reached, to offer reinstatement at that operation to the discharged employees and to embody any such understanding in a written agreement; or if an agreement to resume the Greenpark operation were not reached, to bargain with the Union concerning the effects of the termination decision and to offer the terminated employees reinstatement to positions for which they were qualified at any of

---

[5] No issue is presented here concerning the Board's finding that petitioner unlawfully refused to bargain about the *effects* of the closing on the employees, since petitioner consented to enforcement of that portion of the Board's order by stipulation filed in the court of appeals (Pet. App. 5a; A. 21-22). Nor has petitioner ever disputed the Board's additional conclusion (Pet. App. 21a-22a n.1) that petitioner also refused to bargain with the Union, in violation of Section 8(a)(5) and (1), by failing to respond to the Union's July 12, 1977, letter demanding such bargaining (Pet. App. 5a). Thus, only the Board's determination that petitioner was required to bargain concerning its decision to terminate its Greenpark operation is at issue here.

petitioner's other cleaning and maintenance operations (Pet. App. 22a-23a, 25a). The Board's order also directs petitioner to make whole the terminated employees by payment of back pay until the occurrence of the earliest of four specified conditions (Pet. App. 23a, 25a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-20a). Although it recognized (Pet. App. 11a; footnote omitted) that a "partial closing affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute," the court emphasized (Pet. App. 10a-12a) that there is no *per se* rule mandating bargaining about all partial closing decisions. Rather, it explained (Pet. App. 12a): "[T]he presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain."

The court concluded (Pet. App. 13a-14a) that no such showing was made on the facts of the present case. It found material neither petitioner's assertion that it was losing money at Greenpark nor the fact that petitioner's financial losses were not attributable to labor costs (since, under the contract, Greenpark paid petitioner's employees' salaries and fringe benefits).[6] In the court of appeals' view, "the decisive factor * * * is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably

[6] It was primarily on the basis of those two factors that Judge Kearse dissented from that portion of the court's decision upholding the Board's conclusion that petitioner violated Section 8(a)(5) and (1) by refusing to bargain over the decision to close Greenpark (Pet. App. 16a-20a).

be expected to modify or reverse that decision" (Pet. App. 14a). The court found (*ibid.*) "[o]n the record here * * * sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give [petitioner] an increased management fee." "At least," the court concluded (*ibid.*), if petitioner "had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution."

SUMMARY OF ARGUMENT

1. Sections 8(d), 8(a)(5) and 9(a) of the National Labor Relations Act impose a duty upon an employer to bargain with the collective bargaining representative of its employees about "terms and conditions" of employment. Congress deliberately defined the scope of such mandatory bargaining in broad terms and allocated to the Board the primary responsibility to work out the limits of mandatory bargaining on a case-by-case basis. Guided in large measure by principles enunciated by this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the Board has evolved a general rule that an employer's decision to terminate employees in carrying out a partial closing of its operations is a mandatory subject of bargaining absent circumstances showing that bargaining would be futile or would significantly interfere with the employer's right to manage its business.

2. a. Many factors support the propriety of this rule. The words "terms and conditions of employment" plainly cover the termination of employment

(*Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 210) whether that termination results from subcontracting, as in *Fibreboard*, or from a partial closing, as in this case.

b. Application of such a rule can benefit both employees and employers and effectuate the fundamental purpose of the Act, the maintenance of industrial peace. By bargaining about a decision to curtail operations, an employer can judge the probable labor costs of the closing—*e.g.*, severance pay—in advance and can learn of any concessions in wages, manning, or work procedures that the employee representative may be willing to make to avert the closing. This makes any decision to carry out the closing a more fully informed decision, and it makes bargaining over the effects of the decision—which all agree is required by the Act—more effective. If the employee representative cannot persuade the employer to avoid the closing, it can at least, in this early stage, make suggestions concerning the timing and implementation of the closing that will moderate the impact on the employees.

c. As in *Fibreboard*, the lessons of industrial practice reinforce the Board's rule respecting a decision to curtail operations and discharge employees. Such matters have been successfully provided for in collective bargaining agreements, and even apart from contractual provisions, labor history is replete with instances in which employees have made concessions concerning their wages, hours, and working conditions in order to make their employers' operations more profitable and save their own jobs. Experience has also demonstrated that, where a closing cannot be avoided, advance discussion about the decision

maximizes the chances of an orderly, peaceful implementation of the decision.

d. The Board's application of its rule—which, in accordance with the teachings of *Fibreboard*, requires consideration of all the circumstances in each case—is not an undue interference with entrepreneurial control. The obligation to bargain is not an obligation to engage in marathon discussions, and, if the parties are unable to work out an alternative to a partial closing through good faith bargaining, the employer is free to implement its decision. In addition, the Board makes exceptions in cases in which bargaining would be futile—*e.g.*, where labor costs can have no bearing on the decision—or where, as in the case of emergencies necessitating an immediate closing, the obligation to bargain would significantly interfere with the employer's right to manage its business. This flexible rule, which accommodates the interests of both the employer and the employees, better effectuates the purposes of the Act than the blanket exemption, urged by the dissenting judge below and some courts of appeals, for any case in which the employer's decision may be characterized as a matter of fundamental entrepreneurial discretion.

3. This Court's decision in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), supports the Board's decision here. The Court there recognized that a dispute over an employer's decision to close some of its stations and eliminate unit jobs was a controversy concerning "terms and conditions of employment" within the meaning of Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. 113(c), and the Court rejected the argument that an employee strike to protest the station closings was an attempt to usurp the prerogatives of management. Similarly, as the Board did

here, the Court relied on the lessons of industrial experience and the congressional policy, manifested in the relevant statute, favoring settlement of disputes over working conditions through collective negotiations.

4. *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), is not inconsistent with the Board's decision here. In that case the Court was considering not the scope of an employer's bargaining obligation but the limits of Section 8(a)(3) of the Act, a section that outlaws discrimination in the terms or conditions of employment for the purpose of encouraging or discouraging union membership. The Court held that Section 8(a)(3) does not forbid an employer from going entirely out of business in order to avoid unionization and that it prohibits an employer's discriminatory partial closing only where the closing is motivated by a purpose to chill unionism in the employer's remaining operations.

There is nothing inconsistent in holding that Section 8(a)(5) of the Act requires an employer to bargain about partial closing decisions that it is not forbidden to implement by Section 8(a)(3). Under Section 8(a)(5) the Board does not seek to regulate the content of the employer's decision or to prohibit the employer from implementing its decision after a bargaining impasse is reached. Rather, the Board's concern is with the process of good faith bargaining. Of course, where the employer's decision is predicated on unlawful motives, bargaining is unlikely to be useful. But where, as here, the employer's decision is based solely on economic considerations, experience has demonstrated that bargaining about the employer's partial closing decision can be beneficial to both labor and management and foster the Act's purpose of achieving industrial peace.

5. The propriety of requiring bargaining over partial closing decisions is well illustrated by the facts of this case. Whether or not petitioner's decision was formally predicated on labor costs, matters such as wages, benefits, work practices, and crew size were highly relevant to that decision; and, as the court below found, the record affords sufficient reason to believe that, had the employees been given the opportunity, they might have made concessions that would have permitted petitioner and Greenpark to continue their business relationship on a mutually satisfactory basis. Two weeks were available for negotiation if petitioner had only responded to the Union's request for recognition and bargaining. There is no evidence that bargaining with the Union would have significantly interfered with petitioner's right to manage its business. Petitioner does not contend that reasons of business secrecy or other special circumstances precluded it from negotiating with the Union, and indeed it was willing to have the Union attempt to work out a satisfactory solution with Greenpark but gave it no time to do so.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS ACT OBLIGATES AN EMPLOYER TO BARGAIN WITH THE EMPLOYEES' UNION REPRESENTATIVE ABOUT AN ECONOMIC DECISION TO CLOSE PART OF ITS OPERATION ABSENT CIRCUMSTANCES SHOWING THAT BARGAINING WOULD HAVE BEEN FUTILE OR WOULD HAVE SIGNIFICANTLY INTERFERED WITH THE EMPLOYER'S RIGHT TO MANAGE ITS BUSINESS

The process of collective bargaining between employers and the representatives of their employees inherently constrains the freedom of each side to act totally without regard to the interest of the other

and to make its decisions in ignorance of any compromises that the other might be willing to make with respect to matters affecting both. A fundamental premise of the National Labor Relations Act is that this limited constraint is ultimately beneficial to both parties to the collective bargaining process and that the national interest is best served when existing and potential disputes between employers and employees are resolved in this manner. See 29 U.S.C. 151. In accordance with this premise, Congress has deliberately given broad scope to the bargaining obligation imposed by the Act.

As originally enacted, the Act did not directly specify the subjects about which employers and unions must bargain. Section 8(a)(5) of the Act, now codified at 29 U.S.C. 158(a)(5), simply declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 49 Stat. 453. Section 9(a), in turn, provides that a union selected by a majority of the bargaining unit shall be the collective bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 49 Stat. 453 (now codified at 29 U.S.C. 159(a)).

Section 8(d) of the Act, which is the focal point of this case, was added to the Act in 1947 by the Taft-Hartley Amendments. 61 Stat. 142 (now codified at 29 U.S.C. 158(d)). This provision, using language essentially parallel to that found in Section 9(a), made explicit what was implicit in the original Act:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at rea-

> sonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

Read together, the foregoing provisions of the Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment * * *.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain * * *." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

As this Court has explained, it fell to the Board under the 1935 Act to determine, on a case-by-case basis, which subjects came within the bargaining obligation; and, in enacting Section 8(d) in 1947, "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility" in that area. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979).[7] It has thus been the Board's task to

---

[7] As the Court explained in *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 495-496 (footnote omitted):

> The original House bill had contained a specific listing of the issues subject to mandatory bargaining, H.R. 3020, 80th Cong., 1st Sess., § 2(11) (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess., 22-23, 49 (1947), but this attempt to "straight jacke[t]" and to "limit narrowly the subject matters appropriate for collective bargaining," *id.*, at 71 (minority report); see also 93 Cong. Rec. 3446-3447 (1947) (remarks of Rep. Klein), was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d). S. 1126,

work out the meaning of the statutory phrase "terms and conditions of employment"—and the scope of the concomitant bargaining obligation—in the light of the purposes of the Act and the knowledge the Board has gained from adjudicating a progression of cases that reflect the changing industrial conditions in which collective bargaining has taken place.[8]

The present case concerns the propriety of the Board's conclusion with respect to the obligation of an employer to bargain about a decision, made on economic grounds, to close down a part of its operations and eliminate jobs of unit employees. In evolving a rule governing this subject, the Board has been guided in large measure by principles enunciated by this Court in *Fibreboard Paper Products Corp.* v. *NLRB, supra.*

In *Fibreboard,* the Court sustained the Board's conclusion that the employer was required to bargain collectively about a decision to contract out plant maintenance work previously performed by employees in the bargaining unit. The Court found that the "termination of employment which * * * necessarily results from the contracting out of work performed by members of the established bargaining unit" is

---

80th Cong., 1st Sess. § 8(d) (1947); see 93 Cong. Rec. 6444 (1947) (summary report of Sen. Taft); cf. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 8, 34 (1947).

[8] Here, as with comparable provisions of the Act, "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer * * * [a]nd so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the basis of accumulating experience." *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674 (1961). Accord, *NLRB* v. *Weingarten,* 420 U.S. 251, 264-266 (1975).

"well within the literal meaning of the phrase 'terms and conditions of employment' " (379 U.S. at 210). The Court added that to hold that "contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace" (*id.* at 211). The Court further found that "industrial practices in this country" reinforced the conclusion that "contracting out" is a statutory subject of bargaining; provisions relating to contracting out exist in numerous collective bargaining agreements (*id.* at 211-212). Finally, the Court found that the "Company's decision to contract out the maintenance work did not alter the Company's basic operation," and that therefore "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business" (*id.* at 213). Indeed, as the Court concluded (*id.* at 213-214), the reasons for the employer's decision to contract out—that "economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments"—involved "matters peculiarly suitable for resolution within the collective bargaining framework."

Applying these principles on a case-by-case basis, the Board has concluded that an employer's economic decision to close part of its operations and eliminate unit employees' jobs is a decision to alter their "terms and conditions of employment" within the meaning of Section 8(d) of the Act, and the Board has evolved a rule that an employer is obligated to bargain with the employees' representative before making such a radical change in their conditions of employment absent circumstances showing that bargaining would have been futile or would have significantly inter-

fered with the employer's right to manage its business. This position has been approved by not only the court below in this case, but also by the Third Circuit in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (1978), remanding 230 N.L.R.B. 1002 (1977).[9] We show below that the Board's position is consistent with *Fibreboard* and other relevant decisions of this Court.

A. The Language and the Purpose of the Act, As Well As the Lessons of Industrial Practice, Support the Board's Conclusion that, as a General Rule, the Partial Closing of a Business Operation is a Mandatory Subject of Bargaining

1. As this Court observed in *Fibreboard* (379 U.S. at 210), the words "terms and conditions of employment" plainly cover termination of employment. The language is no less applicable where unit employees are terminated as a result of the employer's decision to close down a part of its operations, than it is where, as in *Fibreboard*, they lose their jobs as a result of the employer's decision to contract out the work they had performed.[10]

---

[9] Both courts begin their analysis with a presumption that an issue so directly affecting employee job rights as a decision to terminate part of an enterprise is subject to mandatory bargaining (Pet. App. 11a; 582 F.2d at 735). Both courts hold, however, that that presumption may be rebutted by countervailing employer evidence demonstrating, for example, that bargaining over the decision at issue would be futile or that the closing was necessitated by emergency financial considerations (Pet. App. 11a-12a; 582 F.2d at 738-739). See also Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768 (1979).

[10] In this brief, and in decisions of the Board and the courts on this question, the subject of bargaining is often referred to simply as a "partial closing." It is evident from the facts

Here also, as in *Fibreboard*, requiring the employer to bargain about the decision to take action directly resulting in the elimination of bargaining unit work would effectuate the fundamental purpose of the Act to promote the peaceful settlement of industrial disputes "by bringing a problem of vital concern to labor and management within the [collective bargaining] framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 211.[11]

The value of bringing such decisions into the collective bargaining process is manifested in several different ways. First, because labor costs or work rules

---

of all of those decisions, however, that only partial closings that affect unit employees' jobs are concerned, and we use the term in that limited sense in this brief. An employer who closes down a part of his operations in which represented employees have neither jobs nor transfer rights obviously has no obligation to bargain about that decision with any union representing employees in other parts of his operations (unless the closing would affect the working conditions of those employees). Thus, the bargaining subject could perhaps more aptly be identified as "termination of bargaining unit work," with subcategories for terminations pursuant to contracting-out decisions and terminations pursuant to partial closing decisions.

[11] Petitioner contends (Pet. Br. 18-20) that to treat a partial closing decision as a mandatory bargaining subject is likely to increase, rather than lessen, industrial strife, for a union would then be entitled to strike in support of its demand that the employer not close down. This contention is contrary to the congressional judgment that underlies the Act—*i.e.*, that subjecting labor-management controversies to the mediatory influence of negotiation is likely to lessen, rather than increase, strikes. See declaration of policy set forth in Sections 1 and 101 of the Labor-Management Relations Act, 29 U.S.C. 141, 151; *NLRB* v. *Jones & Laughlin*

will often be relevant to a decision, made on economic grounds, to close part of an operation, the union will, at the very least, generally be able to provide information relevant to that decision. Even if the union is unwilling to make concessions on wages or work procedures that would make the existing operation more profitable, the employer may decide that the projected shutdown "would cost it more in terms of post-termination expenses, as in severance pay, than it would save." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 736. Moreover, if discussion takes place before, rather than after, a shutdown decision becomes final, the union may at least "make suggestions about the decision's timing and implementation in order to moderate the closing's impact on the work force." *Ibid.*[12]

Steel Corp., 301 U.S. 1, 42 (1937). Thus, recognizing a partial closing decision as a mandatory bargaining subject would insure that the employees and their union representative are given advance notice of the contemplated decision and an opportunity to negotiate about it, rather than being presented with a *fait accompli*. Experience has shown (see *infra*, pages 20-23) that, where this has occurred, it has been conducive to industrial peace and beneficial to both labor and management. And, contrary to petitioner, it is Congress's view that in the long run "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties" (*NLRB* v. *Insurance Agents' Internat'l Union*, 361 U.S. 477, 489 (1960)) reduces strife by permitting vital issues in the employment relationship to be resolved in free collective bargaining in accordance with the relative economic strength of the participants. *Id.* at 489-490, 495.

[12] As the Board has observed in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 570 (1966), in some cases "the effects [of a partial closing] are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised."

Second, because the severe consequences for employees of a partial shutdown may be mitigated only slightly by bargaining about the effects of the shutdown [13] or by unemployment compensation laws and the variety of other state and federal programs providing assistance to workers who lose their jobs,[14] the union, in fact, has a strong incentive to discuss practical alternatives to the decision to close, since persuading the employer to reverse the decision may be the only adequate way to protect the employees. As the Third Circuit observed, "labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 736. See Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks* v. *NLRB*, 92 Harv. L. Rev. 768, 777-779 (1979); Rabin, *Fibreboard and the Ter-*

---

[13] The obligation to bargain about the effects of a partial closing is not questioned here (note 5, *supra*), and in any event is well settled (see Pet. App. 16a, concurring and dissenting opinion).

[14] See *Employee Protection and Community Stabilization Act of 1979: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. (1979) (hereinafter *EPCSA: 1979 Senate Hearings*); *Employee Protection and Community Stabilization Act of 1980: Hearings on S. 1609 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. (1980) (hereinafter *EPCSA: 1980 Senate Hearings*); *Hearings on Plant Closing Problems: Hearings on H.R. 5040 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. (1980) (hereinafter *House Plant Closing Hearings*).

mination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain, 71 Colum. L. Rev. 803, 823-826 (1971). Successful bargaining over these matters is not only widely reported today,[15] but has been a matter of judicial notice by this Court[16] and the subject of scholarly study.[17]

Third, even if after good faith bargaining between the employer and the union, the employer remains

---

[15] See, *e.g.*, *Now, It's Pay Cuts Instead of Raises*, U.S. News & World Report, Feb. 9, 1981, at 74 (reporting several wage concessions in the rubber and steel industry); Wash. Post, Feb. 3, 1981, at E1, col. 4 (reporting that Chrysler employees had ratified a wage and benefit concession that averaged $46 per week per worker); *How Cooper Tire Stays Healthy*, N.Y. Times, Feb. 2, 1981, at D1, col. 3 (reporting how the danger of a plant closing was averted after the employees agreed to a new contract containing benefit concessions and new wage rates designed to reward productivity); Wall St. J., Mar. 4, 1981, at 20, col. 3 (reporting that Braniff flight attendants accept 10% pay cut to help cash-short company); Ruben, *Industrial Relations in 1980 Influenced by Inflation and Recession*, 104 Monthly Lab. Rev. 15-16 (Jan. 1981) (reporting various employee concessions, including an agreement to speed up the production line in order to avert a plant closing); *Bitter Choice: Some Workers Accept Pay Cuts as Alternative to Losing their Jobs*, Wall St. J., July 23, 1971, at 1, col. 6 (reviewing wage concessions by rubber workers, paper-mill employees, watch makers, and cab drivers).

[16] *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 & n.5 (1956) (noting that unsatisfactory business conditions had prompted employees in several industries to accept pay cuts).

[17] See, *e.g.*, Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations*, 26 Indus. & Lab. Rel. Rev. 956 (1973); Greenberg, *Deviations From Wage-Fringe Standards*, 21 Indus. & Lab. Rel. Rev. 197, 207-208 (1968); S. Slichter, J. Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* 824-851 (1960).

convinced of the soundness of its decision to close down part of its operations, the discussions with the union will often have served a useful purpose. If the parties have focused on the decision to close as well as its effects, they may be able, as we have previously suggested (page 19, *supra*), to agree on a way of carrying it out that lessens the severity of its impact on the employees. Furthermore, an employer's candid discussion of the economic necessity for the closing can assure the employees that the action is being taken in good faith and is unavoidable. Such assurance is indispensable if the parties are to give their undivided attention to devising constructive measures that will assist the employees in adjusting to the impending change.

Contrary to petitioner's fears (Pet. Br. 18), a number of employers have found that candid discussion of these matters pays practical dividends: the employees cooperate in the transition, productivity is maintained or increased, and the legitimate interests of the employer, the employees, and the public are peacefully accommodated.[18] Indeed, quite apart from

---

[18] See, *e.g.*, Testimony of Carroll H. Teague, Vice President, Personnel and Labor Relations, Brown & Williamson Tobacco Corp., before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. (Sept. 17, 1980), *reprinted in* BNA Daily Lab. Rep., at D-1 (Oct. 2, 1980); Hershey, *Layoff Ahead: How Do Employees Respond?*, 49 Personnel 29-35 (Nov. 1972); *'Out of Business': A Plant Shutdown is Always Painful, But it Need Not Be Merciless*, Wall St. J., Feb. 28, 1972, at 1, col. 6; A. Slote, *Termination: The Closing of Baker Plant* 5-7, 25, 37-39, 69-79, 322 (1969); E. Whitman and W. Schmidt, *Plant Relocation: A Case History of a Move* 91, 101-103, 154-158 (1966).

any legal obligation to bargain over the employer's decision, management experts have advocated advance notice and frank discussion of the reasons for the decision on the practical ground that a demonstrated regard for the interests of the employees maximizes the chances of a peaceful transition. See, *e.g.*, Thompson, *How to Avoid People Problems in a Plant Relocation*, 67 Management Rev. 32-34 (Sept. 1978); Watson, *A Sensible Approach to Mass Layoffs*, 3 Pub. Personnel Management 233, 236-237 (1974).[19]

The practicality of negotiating over a proposed decision to terminate bargaining unit work through a partial shutdown of operations is, finally, indicated by the fact that some employers and unions have successfully negotiated contract provisions covering such events. See *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 211-212. As petitioner has noted (Pet. Br. 21-23), provisions governing plant

---

[19] Conversely, the failure to engage in frank discussion about matters of such vital concern to employees has been productive of suspicion, recrimination, and industrial strife. For example, economically-motivated plant closing decisions, when not candidly explained, often give rise to a belief that the reason for the closing is discriminatory, and protracted litigation over the employer's true motivation has often resulted. See, *e.g.*, *Thompson Transport Co.*, 165 N.L.R.B. 746, 752-754 (1967), enforcement denied in part, 406 F.2d 698 (10th Cir. 1969); *McLoughlin Mfg. Corp.*, 164 N.L.R.B. 140, 146-147 (1967), supplemental decision after remand, 182 N.L.R.B. 958, 962-964 (1970), enforced, 463 F.2d 907, 919-921 (D.C. Cir. 1972); *Production Molded Plastics, Inc.*, 227 N.L.R.B. 776, 777-778, enforced, 604 F.2d 451, 452 (6th Cir. 1979). In each of the foregoing cases, the Board, although finding that the employer's refusal to bargain violated Section 8(a)(5) of the Act, dismissed complaint allegations, which the administrative law judge had sustained, that the closing was discriminatorily motivated.

shutdowns appear to be less frequent than provisions governing the practice of contracting out; but this is not surprising in view of the fact that shutdowns are less likely than contracting out to occur in reasonably sound companies, and hence less likely to be anticipated by employers and employees. As plant closings become a more serious and widely publicized problem, however (see note 14, *supra*), an increase in the frequency of such provisions may well occur.[20] In any

---

[20] See, *e.g.*, *House Plant Closing Hearings* at 219 (expressing intent of unions to meet increasingly severe plant closure problem with contract provisions); *EPCSA: 1980 Senate Hearings* at 73 (same). The proposed legislation considered at these hearings would go far beyond the National Labor Relations Act, as the Board has construed it, in imposing obligations on employers with respect to plant shutdowns. For one thing, both S. 1609 (96th Cong., 1st Sess. (1979)) and H.R. 5040 (96th Cong., 1st Sess. (1979)) would apply to total plant shutdowns as well as partial terminations of operations and to nonunionized businesses as well as to those in which the employees have collective bargaining representatives. S. 1609, §§ 3(6), 3(7) and 3(10); H.R. 5040, §§ 3(5), 3(12). The legislation would, moreover, establish minimum periods of up to two years, depending on the size of the establishment, for notice of an impending shutdown, and such notice would have to be given to communities, all affected employees, and the Secretary of Labor, as well as to any collective bargaining representative (S. 1609, § 4(a); H.R. 5040, §§ 4(a), 4(b)(3)(A)). Employers would also be required to file statements explaining the reasons for proposed closures with the Secretary of Labor, and the Secretary would be empowered to investigate, conduct hearings, and issue a report with recommendations respecting an employer's proposed shutdown of operations. S. 1609, §§ 4-6; H.R. 5040, §§ 4-6.

Minority counsel for the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor sought to suggest that the legislation was unnecessary because of the existence of collective bargaining rights under

event, the contractual evidence is surely no indication that the subject of partial closings that eliminate bargaining unit work is not amenable to the collective bargaining process. 379 U.S. at 211.

In sum, as was the case with the contracting-out decision considered in *Fibreboard*, a general rule requiring bargaining about a decision to close part of an employer's operations is consistent with the language of the Act, takes account of industrial realities, and effectuates the purpose of the Act—the promotion of industrial peace—by increasing the possibility that job losses may be avoided through union-management cooperation and, where they cannot be avoided, by facilitating both employee acceptance of the necessity of such losses and joint labor-management planning to reduce their impact. For these reasons the Board properly construed the Act and followed this Court's decision in *Fibreboard* in concluding that an employer's economically motivated decision to terminate a portion of its business is a subject on which Section 8(d) generally mandates bargaining.[21]

---

the National Labor Relations Act with respect to plant closures. *House Plant Closing Hearings* at 101, 214-215. The union witnesses acknowledged the existence of Board remedies, but asserted that the additional remedies in the proposed bill were also needed because the results of negotiations were not always satisfactory. *Ibid.* Similarly, other witnesses at both the House and Senate hearings expressed dissatisfaction with bargaining over decisions to close because they believed the process unduly favored employers, enabling them to extract substantial concessions in wages and work rules from unions in exchange for maintaining plant operations. *EPCSA: 1980 Senate Hearings* at 105, 272; *EPCSA: 1979 Senate Hearings* at 316-317; *House Plant Closing Hearings* at 292.

[21] See, *e.g.*, *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788 (1964), enforced in pertinent part, 361 F.2d 512, 516-517

2. Like the Court in *Fibreboard* (379 U.S. at 213-214), however, the Board, in recognition of the need to accommodate the employer's legitimate interests, has acknowledged exceptions to this general rule where the circumstances indicate that bargaining would have been futile—*e.g.*, when the employer's economic position is such that no concessions the union could conceivably offer the employer would permit continued maintenance of the operations—or that bargaining would otherwise have significantly interfered with the employer's right to manage its business.[22]

(5th Cir.), cert. denied, 385 U.S. 935 (1966) (termination of cheese cutting and packing operation); *Ozark Trailers, Inc., supra* (closing of one of several plants); *Brockway Motor Trucks*, 230 N.L.R.B. 1002 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978), reaff'd on remand, 251 N.L.R.B. No. 23, 104 L.R.R.M. 1515 (Aug. 11, 1980), petition to review, No. 80-2327 (3d Cir., filed Sept. 19, 1980) (same); *Electrical Products Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323, 329-330 (1978), enforced, 617 F.2d 977 (3d Cir. 1980), cert. denied, No. 80-67 (Oct. 6, 1980) (same); *ABC Trans-National Transport, Inc.*, 247 N.L.R.B. No. 25, 103 L.R.R.M. 1116 (Jan. 11, 1980), aff'd on merits but remanded for reconsideration of remedy, No. 80-1155 (3d Cir. Feb. 19, 1981) (closing of freight terminal).

[22] See, *e.g.*, *Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606, 1607 (Nov. 16, 1979) ("the Board does not require an employer to bargain over the closing of an operation in situations, such as here, where the decision is predicated on economic factors so compelling that bargaining could not alter them"); *Raskin Packing Co.*, 246 N.L.R.B. No. 15, 102 L.R.R.M. 1489, 1490-1492 (Oct. 15, 1979) (sudden cancellation of line of credit made immediate closing necessary and made bargaining infeasible); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972), enforced on other grounds, 474 F.2d 1352 (7th Cir. 1973) ("[w]e do not believe that the Act contemplated eliminating the prerogative of an employer, as

Recognizing the interest of the employer in eschewing bargaining in such circumstances does not, however, logically require permitting employers to avoid bargaining about an economic decision affecting employees in *every* case in which it may be said that that decision involves subsidiary decisions respecting capital investment or can be characterized, in the words of the dissenting judge below (Pet. App. 19a), as "a matter of fundamental entrepreneurial discretion." In employing such reasoning, the dissenting judge below and other courts of appeals which have held that an economic decision to close a portion of an operation is not a mandatory bargaining subject under Section 8(d) of the Act (see cases cited at Pet. Br. 30-32), have relied on the statement in the concurring opinion in *Fibreboard* (379 U.S. at 223, Stewart, J., concurring) that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."

---

here, to eliminate itself as an employer" by closing down a distinct line of business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), aff'd, 470 F.2d 422 (D.C. Cir. 1972) ("decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much 'at the core of entrepreneurial control' "). Cf. *Sucesion Mario Mercado E Hijos d/b/a Central Rufina*, 161 N.L.R.B. 696 (1966) (no duty to bargain where compelling economic circumstances necessitated employer's decision to cease certain of its operations and contract out this work; " 'our condemnation in *Fibreboard* and like cases of the unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved' " (*id.* at 700, quoting *Westinghouse Electric Corporation (Mansfield Plant)*, 150 N.L.R.B. 1574, 1576 (1965)).

But such reliance on that portion of the *Fibreboard* concurrence creates a blanket exemption for any management decisions that may be termed "fundamental to the basic direction of a corporate enterprise" (379 U.S. at 223); and such an exemption is not warranted by the Court's opinion in *Fibreboard*, which holds that the determination whether a subject is within the area of mandatory bargaining is to be determined on the basis of a careful consideration of all of the relevant circumstances. Moreover, as the Third Circuit explained in rejecting a similar argument in *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 737, such an argument rests on the premise that labor has no appropriate role in discussing "complex issues of a managerial nature" and it thereby "paints with too broad a brush." As the court explained (*ibid.*; footnote omitted):

> Like any important action by an employer, including that of subcontracting, the decision to close a portion of an employer's operations has many components. With regard to some aspects of an employer's decision, the union perhaps may not be an expert or, even, a particularly helpful interlocutor. But that observation does not in any way defeat the proposition that with respect to other aspects of such a determination—especially those bearing upon the production costs of labor and the labor-related expenses involved in carrying the decision into effect—the union is fully apprised of relevant and important facts, and could well make a contribution that might enable the employer to keep the plant in question economically viable.

A rule requiring an employer, in non-emergency circumstances, to gather information relevant to a decision to close part of its operations and to engage in

good faith discussion with an interested party concerning possible alternatives to closing is hardly an unwarranted interference with entrepreneurial control. See Comment, *supra*, 92 Harv. L. Rev. at 775-776. Of course, where circumstances are such that labor costs and work rules can have no bearing on a decision to close, then the decision is one for management alone and the Board would not require bargaining.

Petitioner (Pet. Br. 18) and the Chamber of Commerce of the United States as amicus curiae (Chamber Br. 2, 19) further contend that to require bargaining about partial closing decisions would hamper the employer in promptly responding to eliminate marginal or uneconomic operations. The duty to bargain does not, however, include a duty to agree, nor does it impose a duty to engage in marathon discussions. *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 210, 214; *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964). Accordingly, if the parties are unable to agree and an impasse is reached, the employer remains free to implement its proposed decision. And, in situations where bargaining would clearly be futile or otherwise impracticable, no obligation is imposed (see note 22, *supra*). Moreover, petitioner's and the Chamber's exclusive focus on management's interest in being able to make closing decisions without first notifying and negotiating with the union ignores the "countervailing interests of the employees in a decision immediately affecting their fortunes." *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 734 n.83. As the Board pointed out in *Ozark Trailers, Inc.*, *supra*, 161 N.L.R.B. at 566:

> [J]ust as the employer has invested capital in the business, so the employee has invested years of

> his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

In sum, the Board's approach to partial closing cases gives appropriate weight to the employer's interest in managing its business efficiently without unnecessarily sacrificing the employees' interest in attempting, through collective bargaining, to save their jobs. Where decision bargaining would inevitably be only a useless delay or where pausing to bargain would prevent the employer from taking steps critical to the financial well-being of the total enterprise, the Act, as the Board construes it, imposes no bargaining obligation. Where such circumstances do not exist, the Board properly reads the Act as requiring the employer to afford its employees' bargaining representative an opportunity to persuade it that other modifications in wages, hours, or terms and conditions of employment may so alter the employer's economic position that the proposed curtailment of operations can be avoided.

B. The Board's Conclusion that a Decision to Close Part of an Operation is Ordinarily a Mandatory Bargaining Subject is Further Supported by this Court's Decision in *Railroad Telegraphers*

In *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), the railroad, operating at a loss, decided to abolish some stations and consolidate others—an action that would have resulted in a reduction of the number

of its employees. The railroad offered to negotiate about severance pay for the employees dismissed, but it refused to negotiate with the bargaining representative about its decision to abolish the jobs, contending that this was a management prerogative. When the union threatened a strike in order to secure an agreement that no unit jobs would be eliminated without its consent, the railroad sought an injunction, arguing that its issuance was not barred by the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, because the case was not one "involving or growing out of any labor dispute" (29 U.S.C. 104). The term "labor dispute" is defined in the Norris-LaGuardia Act as "any controversy concerning terms or conditions of employment" (29 U.S.C. 113(c)). The Court rejected the railroad's contention, saying (362 U.S. at 335-336):

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. * * *
>
> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. * * *

The Court also rejected the argument, accepted by the court of appeals, that an employee strike to prevent the station closings " 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the

most economical and efficient conduct of its operations' " (362 U.S. at 336; footnote omitted). Noting that the vast majority of railroads and unions had long negotiated collective agreements designed to ameliorate the effects of management decisions resulting in the displacement of employees, the Court concluded that "[i]t is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large" (*id.* at 338).

Finally, the Court rejected the railroad's argument that the union was acting unlawfully under the Railway Labor Act in pressing its demand that the railroad bargain over the station closings, stating (*id.* at 339):

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First.

As we have shown (*supra*, pages 17-25), the same considerations have entered into, and support the propriety of, the Board's conclusion that, as a general rule, the decision to close part of an operation is a mandatory bargaining subject under Section 8(d) of the National Labor Relations Act.[23]

---

[23] Indeed, the phrase "working conditions" in the Railway Labor Act is narrower than the phrase "terms and conditions of employment" in Section 8(d) of the National Labor Relations Act. See *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-255 (7th Cir. 1948), cert. denied on this point, 336 U.S. 960

C. The Board's Conclusion is Not Inconsistent with this Court's Decision in *Darlington*

Contrary to the contention of the Chamber of Commerce of the United States (Chamber Br. 8-11), the Board's conclusion that there is ordinarily a duty to bargain about a partial closing is not inconsistent with this Court's decision in *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

In *Darlington*, the Court held that an employer does not violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3)—which bars discrimination in employment aimed at discouraging union membership—by closing its entire business operation, even though the liquidation is motivated by vindictiveness toward the union. The Court reasoned that the "closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place" (380 U.S. at 274). The Court distinguished "a discriminatory partial closing," which "may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees"; and it noted further that "a possible remedy open to the Board in such a case * * * is to order reinstatement of the discharged employees in the other parts of the business" (*id.*

(1949) ("A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act."). And the definition of "labor dispute" in Section 2(9) of the National Labor Relations Act, 29 U.S.C. 152(9), is taken from the earlier Norris-LaGuardia Act. See S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935).

at 274-275). Accordingly, the Court held that "a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect" (*id.* at 275).

The Court, noting (380 U.S. at 267 n.5) that "no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise," did not pass on that question. The Chamber nonetheless contends (Br. 8-11) that construing the Act to impose a duty to bargain about an economic decision to close part of a business operation is inconsistent with the holding in *Darlington* that an employer may close part of a business even for anti-union reasons without violating Section 8(a)(3) unless it is shown that there was an intention to chill unionism in the remainder of the business. This argument is without merit.

First, in noting that no argument was made concerning the requirements of Section 8(a)(5) respecting a business decision to terminate an enterprise, the Court was taking account of the fact that the Board did not argue the point in its brief in *Darlington*. But neither the Board in its brief nor the Court in *Darlington* suggested that a bargaining obligation would be inherently inconsistent with the notion that an employer has the right—or the prerogative—to close down a plant for economic reasons. Thus, in its *Darlington* brief, the Board stated (Br. 28) that it "fully recognize[d] the businessman's privilege to make and put into effect business decisions, including a decision to close a plant, for normal economic motives." But it added (Br. 28 n.24):

> Since the closing here was found not motivated by economic considerations, there is no need to consider how far there is a duty to bargain concerning a projected curtailment of operations or the abandonment of a business for economic reasons. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, No. 14, this Term. In any event, the duty to negotiate with the union is not a duty to agree.

Then, as now, the Board properly saw nothing inconsistent in acknowledging that an employer has a right to take a given action and requiring that he bargain with the employees' collective bargaining representative *before* taking that action. In the latter case, the employer would still be free, were an impasse reached, to take the action contemplated. See *Brockway Motor Trucks*, *supra*, 230 N.L.R.B. at 1003 (Board mandates only the process of good faith bargaining, not any particular outcome of negotiation). By the same token, in holding in *Darlington* that an employer has a right to close part of his business for antiunion reasons if he does not do so for the purpose and with the effect of chilling union activity in other parts of his enterprise, the Court did not ineluctably assume that he may close it abruptly without first discussing the closure with the union.

However, there is a practical reason why it may not always be worthwhile to consider the applicability of Section 8(a)(5) to a plant closure in a case in which discriminatory motivation exists. If an employer is willing to take the drastic step of going out of business, either in whole or in part, simply to penalize the employees for joining a union, requiring the employer to discuss his unlawful motives with the union would rarely be useful; indeed, to

the extent that he gives expression to such motives, he simply intimidates any employees who hear the message.[24] Of course, where such an employer has not closed his entire operation, the purpose of Section 8(a)(3) of the Act—to keep employers from using their hiring and firing power to interfere with union organization (see H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935))—can be served by undoing harm deliberately inflicted on employees in the remaining parts of his enterprise. Requiring the employer to reopen the operation in question, if feasible, or to give backpay to the discharged employees and reinstate them or place them on a preferential hiring list would be appropriate remedies in such circumstances to demonstrate to the remaining employees that they are free to exercise their rights under the Act.

On the other hand, the purpose of Section 8(a)(5)—to ensure that the union is recognized as the representative of the affected employees and permitted to negotiate on their behalf—can be effectuated by requiring bargaining where the partial closing decision rests on economic considerations.[25] In this situation, as we have demonstrated (pages 17-30, *supra*),

---

[24] In *Darlington* the Court cautioned that nothing in its opinion "would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision." 380 U.S. at 274 n.20.

[25] As the court below noted (Pet. App. 11a n.6), the question whether Section 8(a)(5) would impose a duty to bargain with respect to an economic decision to close an entire business is not presented here. See also *Ozark Trailers, Inc., supra*, 161 N.L.R.B. at 564-565.

results beneficial to both labor and management may be achieved, and the fundamental purpose of the Act—the preservation of industrial peace—is furthered by requiring the employer to bargain with the employees' representative before taking any action that will cost them their jobs.

II. ON THE FACTS OF THIS CASE, THE BOARD PROPERLY CONCLUDED THAT PETITIONER WAS REQUIRED TO BARGAIN WITH THE UNION OVER ITS DECISION TO TERMINATE ITS GREENPARK OPERATION

The propriety of requiring bargaining over partial closing decisions is well illustrated by the facts of this case. The continued employment of the 35 employees whom petitioner supplied to Greenpark for a price composed of labor costs plus a management fee hinged on a "strictly dollars and cents" (A. 83) issue: whether petitioner could secure an increase in the profits of the operation by August 1. Greenpark could not afford to pay more, but, having earlier secured concessions from petitioner on both price and service, it was satisfied with the price it was then paying. In these circumstances, the only alternative to losing their jobs was for the employees to agree to cost-cutting measures that would enable petitioner to offer Greenpark a package that cost Greenpark no more but allowed petitioner to receive the benefit of the newly achieved economies. Thus, as the court of appeals noted in *Fibreboard*, it is realistic to think that the employees might agree "to increase productivity and reduce costs." [26] In-

---

[26] *East Bay Union of Machinists, Local 1304* v. *NLRB*, 322 F.2d 411, 414 (D.C. Cir. 1963) (Burger, J.), aff'd *sub nom. Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

deed, the court below found (Pet. App. 14a) sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would * * * have enabled Greenpark to give [petitioner] an increased management fee." It is neither possible nor necessary to determine whether bargaining would have resulted in a bargain satisfactory to both sides. *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 214. The critical point is that, contrary to petitioner's claims (Pet. Br. 24), whether or not its decision was formally predicated on labor costs, matters such as wages, benefits, work practices, and crew size were highly relevant to that decision. Where, as here, an employer has "frustrated collective bargaining with respect to these concededly bargaining issues * * *, it can properly be found to have violated its statutory duty under § 8(a)(5)." 379 U.S. at 225 (Stewart, J., concurring).

Furthermore, although "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action" (*NLRB* v. *Katz*, 369 U.S. 736, 748 (1962)), no such circumstances are presented here. As demonstrated above, this is not a case "where the economic factors guiding the management decision to close * * * are so compelling that employee concessions cannot possibly alter the cost situation" (*Ozark Trailers, Inc.*, *supra*, 161 N.L.R.B. at 570).[27] Nor is this a case where, as a

---

[27] Cf. *Brooks-Scanlon, Inc.*, *supra*, 246 N.L.R.B. No. 76, 102 L.R.R.M. at 1607 (shutdown of saw mill department "emanated solely from the insufficient supply of pine timber which existed in the immediate area"); *NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 195, 196 (3d Cir. 1965) ("no room for union negotiation" in circumstances

result of an emergency or some other compelling circumstance, there was no time for bargaining.[28] On the contrary, during the two-week period between July 12 (when the Union made a formal request for collective bargaining negotiations which petitioner thereafter ignored) and July 25 (when petitioner advised Greenpark that it would definitely terminate its services as of August 1), petitioner admittedly was engaged in discussions with Greenpark (A. 75), and there is no reason why it could not have had discussions with the Union as well.[29]

---

where the employer's closing of a money-losing plant was precipitated by a final offer from local housing authority planning to redevelop the area); *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 935-937 (9th Cir. 1967) (no obligation to bargain where the employer's closing of the facility and relocation as minority partner in a new joint venture was prompted by the threat of being unable to serve adequately its principal customer); *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969) ("No amount of collective bargaining could erase the economic facts that gave rise to the Company's decision to close * * *."); *Int'l Ass'n of Machinists and Aerospace Workers* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 551, 557 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (the company "asserts without contradiction that this [merger] is its last chance for survival"; "[t]he economic necessity for a merger cannot be eliminated by bargaining * * *").

[28] Cf. *Raskin Packing Co., supra*, 246 N.L.R.B. No. 15, 102 L.R.R.M. at 1490-1492 (employer's ongoing line of bank credit was suddenly cancelled and immediate action by the employer was required); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) ("small" and "money-losing enterprise" suffered theft of two trucks, creating "overwhelming economic need for shutting down then and there").

[29] Petitioner's continued reliance (Pet. Br. 25) on the fact that Greenpark refused the Union's July 28 request that it waive its right to a 30-day termination notice overlooks the

Finally, nothing in the record suggests that bargaining with the Union would have significantly interfered with petitioner's right to manage its business. Although a third party—Greenpark—was involved, petitioner does not claim, and the record does not show, that its refusal to bargain was justified because of a legitimate need for secrecy in negotiations with any third party,[30], or an obligation to preserve a third party's confidences.[31] Nor, as shown, is this a case where the employer's decision was predicated exclusively on financial or entrepreneurial considerations that could not be influenced by bargaining.[32] Petitioner was not going completely out

---

fact that there was ample opportunity to bargain about the decision earlier, if only petitioner had responded to the Union's July 12 request.

[30] Cf. *General Motors Corp., supra*, 191 N.L.R.B. at 952 (decisions to sell part of a business "ofttimes require secrecy as well as the freedom to act quickly and decisively").

[31] Cf. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979) (confidentiality interest justified employer's qualified refusal to supply collective bargaining representative with requested information).

[32] Cf. *National Car Rental System, Inc.*, 252 N.L.R.B. No. 27, ALJD slip op. 14-15, 105 L.R.R.M. 1263, 1268 (Sept. 16, 1980) (closing of terminal and sale of accounts, in response to competitor's unsolicited offer to buy, was based on matters "essentially financial and managerial in nature" involving the "scope and ultimate direction of an enterprise"); *NLRB* v. *Burns Internat'l Detective Agency, Inc.*, 346 F.2d 897, 899-902 (8th Cir. 1965) (no obligation to bargain concerning decision to cancel a contract and close out a division following the loss of all other contracts in the metropolitan area and unsuccessful attempts to secure additional business, in circumstances where the employer could not continue to service the one remaining customer without incurring a substantial financial loss).

of business,[33] or even terminating a distinct line of business.[34] On the contrary, petitioner was continuously engaged in providing cleaning and maintenance services for various commercial customers (A. 24-25, 31), and, as the administrative law judge found (Pet. App. 33a), the record does not show that the termination of the contract—which involved no capital—either altered the nature of petitioner's business or substantially affected its total size.[35] Even after the closing was announced, petitioner was will-

---

[33] Cf. *Merryweather Optical Co.*, 240 N.L.R.B. 1213, 1214-1215 & n.1 (1979). See also *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971, 978, 988, enforced on other grounds *sub nom. NLRB* v. *Armato*, 199 F.2d 800 (7th Cir. 1952), discussed by petitioner (Pet. Br. 14 n.13).

[34] Cf. *Summit Tooling Co., supra*, 195 N.L.R.B. at 480; *NLRB* v. *Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970).

[35] At the hearing petitioner did not attempt to establish that the cancellation of the Greenpark job substantially reduced its size or altered its basic operation. The evidence upon which petitioner now relies for this proposition (Pet. Br. 25)—namely, the "guess" of its co-owner that "between two to four" other nursing homes were serviced during this period (A. 84)—was not introduced for the purpose of establishing petitioner's size. Rather, it was a preliminary inquiry preparatory to petitioner's counsel's reexamination of the co-owner on the question of whether there was any interchange among petitioner's nursing home work crews (A. 84-85; see also A. 63-64). This inquiry appears to have been related to the fact that petitioner had refused to offer transfers to the Greenpark employees (A. 109), and the General Counsel was desirous of pursuing matters that might indicate discriminatory motivation (Tr. 15-16; A. 58). The administrative law judge found that the co-owner's "guess" as to the number of nursing homes serviced was either evasive or an indication that petitioner's "overall operations are so extensive the secretary-treasurer cannot keep in mind how many are of a particular type" (Pet. App. 29a), and he inferred the latter (Pet. App. 30a, 32a).

ing to continue at Greenpark if the Union could work out satisfactory arrangements, but, by withholding notice of its decision, it left the Union with no time to do so.

In sum, balancing the interests of the employer and the employees in light of the policy of the Act to promote the peaceful settlement of industrial disputes through collective bargaining, the Board could reasonably find that petitioner's failure to give the employees' representative notice and opportunity to bargain about its decision to discontinue the Greenpark operation and terminate the employees violated Section 8(a)(5) of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals enforcing the Board's order should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN H. FERGUSON
Attorney
National Labor Relations Board

MARCH 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 343688 299

Office-Supreme Court, U.S.
FILED
APR 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR FIRST NATIONAL MAINTENANCE CORPORATION

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
PERRY S. HEIDECKER

MILMAN, NANESS & POLLACK
1175 West Broadway
Hewlett, New York 11557

Attorneys for Petitioner
First National Maintenance Corp.

Of Counsel:

SANFORD E. POLLACK
PERRY S. HEIDECKER

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
ARGUMENT	2
I. This Court's Decision Announced in *Railroad Telegraphers* Does Not Suggest That An Employer's Decision To Terminate A Losing Portion Of Its Operations Is A Mandatory Subject Of Collective Bargaining	2
II. The Decision and Principles Announced By This Honorable Court In *Darlington* Suggest That An Employer's Partial Closing Decision In the Absence of Union Animus Is Not A Mandatory Subject of Collective Bargaining	7
A. The Board's Position Is Inherently Inconsistent With The Decision of This Court in *Darlington*	7
B. In the Absence of Union Animus, There Exists No Distinction At Law Or In Reason Which Suggest Imposition of a Mandatory Duty to Bargain Over a Decision to Terminate Operations Upon an Employer Operating More Than One Facility. This Conclusion is Reasonably Premised Upon the Court's Pronouncement in *Darlington* That No Such Duty Exists in the Context of an Employer's "Complete" Business Closing	9
III. The Statistics Offered By The Board and its Amici To Support The Contention That Industrial Experience Illustrates the Propriety of Extending The Scope of Mandatory Bargaining to Decisions to Close Part of a Plant are Not Probative	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES PAGE

Chicago & North Western Railway Co. v. *United Transportation Union*, 402 U.S. 570, 91 Sup. Ct. 1731, 20 L.Ed. 2d 187, 65 Lab. Cas. ¶ 11,766, 77 L.R.R.M. 2337 (1971) 4

Fibreboard Paper Products v. *NLRB*, 379 U.S. 203, 85 Sup. Ct. 398, 13 L.Ed. 2d 233, 57 L.R.R.M. 2609, 50 Lab. Cas. ¶ 19,384 (1964) ..... *passim*

General Motors Corp., 191 N.L.R.B. 951, 77 L.R.R.M. 1537, 71 CCH ¶ 23,264 (1971) 13, 14

Local 777, Democratic Union Organizing Committee v. *NLRB*, 603 F.2d 862, 101 L.R.R.M. 2628, 86 Lab. Cas. ¶ 11,372 (D.C. Cir. 1979) 13

National Car Rental Systems, Inc., 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263, 80-1 CCH ¶ 17,448 (1980) ..13, 14

NLRB v. *International Harvester Co.*, 618 F.2d 85, 104 L.R.R.M. 3098, 88 Lab. Cas. ¶ 12,073 (9th Cir. 1980) 13

NLRB v. *Southern Plasma Corp.*, ____F.2d____, 105 L.R.R.M. 2782 (5th Cir. 1980) 10

NLRB v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 Sup. Ct. 718, 2 L.Ed. 2d 823, 42 L.R.R.M. 2034, 34 Lab. Cas. ¶ 71,492 (1958) 5, 12

Order of Railroad Telegraphers v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330, 80 Sup.Ct. 761, 4 L.Ed. 2d 774, 45 L.R.R.M. 3104, 39 Lab. Cas. ¶ 66,415 (1960) ..... *passim*

Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. 1264, 67 CCH ¶ 20,834 (1966) 9, 12, 14

PAGE

Textile Workers Union v. *Darlington Manufacturing Co.*, 380 U.S. 263, 85 Sup. Ct. 994, 13 L.Ed. 2d 827, 58 L.R.R.M. 2657, 51 Lab. Cas. ¶ 19,590 (1965) ...7, 8, 9, 10, 11, 12

Town & Country Mfg. Co., 136 N.L.R.B. 1022, 49 L.R.R.M. 1918, 62 CCH ¶ 11,100 (1962) 6

STATUTE:

United States Code:

Title 29, U.S.C. Section 158(a)(5) 6, 7, 8, 10, 13

OTHER AUTHORITIES:

Goetz, *The Duty To Bargain About Changes In Operations*, 1964 Duke L.J. 1 (1964) 5, 6

Note, *Labor Law Problems In Plant Relocation*, 77 Harv. L. Rev. 1100 (1964) 5

O'Connell, *The Implications Of "Decision" Bargaining*, 16th Ann. N.Y.U. Conf. on Labor 99 (1963) 5, 6

Rabin, *Limitations On Employer Independent Action*, 27 Vand. L. Rev. 133 (1974) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR FIRST NATIONAL MAINTENANCE CORPORATION

INTRODUCTION

This reply brief is respectfully submitted on behalf of the Petitioner, First National Maintenance Corp., in opposition to the briefs submitted on behalf of the National Labor Relations Board and amici curiae, AFL-CIO and United Auto Workers.

ARGUMENT

I.

THIS COURT'S DECISION ANNOUNCED IN *RAILROAD TELEGRAPHERS* DOES NOT SUGGEST THAT AN EMPLOYER'S DECISION TO TERMINATE A LOSING PORTION OF ITS OPERATIONS IS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

The National Labor Relations Board[1] and its amici AFL-CIO and UAW[2] have distortedly suggested that the Court's decision in *Order of Railroad Telegraphers* v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330 (hereinafter "*Railroad Telegraphers*") critically impacts the resolution of the question now pending before this Court.[3] We submit that neither the sole issue nor the holding of this Court in *Railroad Telegraphers* suggests in any meaningful way that a managerial decision to terminate a losing portion of a subsisting enterprise in the absence of union animus imposes a mandatory duty to bargain with regard to such a decision.

The *Railroad Telegraphers* case arose from the railroad's filing of a complaint in federal district court in an attempt to enjoin the union's work stoppage and strike. The sole issue before the Court concerned whether the provisions of the Norris-LaGuardia Act barred an injunction in the circumstances of the case. This Court held merely that the case did in

---

1 *See* Bd. Br. at 10-11, 30-32.

2 *See* AFL-CIO, UAW Br. at 3-4, 10-15, 24-25.

3 The amicus brief submitted by the AFL-CIO and UAW drastically mischaracterizes the plain import and limited holding of *Railroad Telegraphers*, representing to this Court that *Railroad Telegraphers* held that a union demand to bargain about the closing of railroad stations was a mandatory subject for bargaining under the Railroad Labor Act. *See* particularly AFL-CIO, UAW Br. at 3. This remarkable misreading of *Railroad Telegraphers* is succinctly clarified in the immediate accompanying text of Petitioner's brief, *infra*.

fact involve or grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act and that the federal district court was without jurisdiction to permanently enjoin the employees' strike.

In this Court's view, the demand by the union in *Railroad Telegraphers* for a modification of an existing collective bargaining agreement requiring the concurrence of the railroad and the union before jobs could be abolished under a contemplated plan of centralization was a "labor dispute" under section 13(c) of the Norris-LaGuardia Act. That statutory provision defines a "labor dispute" as including "any controversy concerning terms or conditions of employment". This Court held with precision that this language controlled the disposition of the case rendering the federal courts without jurisdiction to enjoin the union's strike action in support of its *request* for modification of the parties' collective bargaining agreement. 362 U.S. at 335.

Contrary to the representation made by the Respondent and amici AFL-CIO and UAW[4] that *Railroad Telegraphers* stands as controlling precedent for the proposition that an employer's partial closing decision is a mandatory subject of collective bargaining under the National Labor Relations Act, this Court's determination was restricted to the holding that the union's demand for bargaining with regard to the proposed contract modification was not an unlawful bargaining subject under the Railway Labor Act, 49 U.S.C. § 151 *et seq.* The Court observed:

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152. First . . . It would stretch credulity too far to say that the Railway Labor

---

4 *See* note 3, *supra.*

> Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. 362 U.S. at 339-40.

The issue before this Honorable Court is one that the commentators have observed was reserved for future consideration when *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) was announced several years ago. This Court in *Fibreboard* did not hold or even postulate that *Railroad Telegraphers* was a critical component in assessing whether an employer's subcontracting decision is a mandatory subject of collective bargaining. The Court made extremely limited reference to *Railroad Telegraphers* in citing the case as supportive of the proposition that the subcontracting question raised in *Fibreboard* was "well within the literal meaning of the phrase 'terms and conditions of employment.' " 379 U.S. at 210. The Court then proceeded to fully consider whether bargaining over management's subcontracting decisions would effectuate the avowed purposes of the Act, whether industrial practices in this country suggested the propriety of the subject matter for bargaining, and whether the facts of the case "illustrate(d) the propriety of submitting the dispute to collective negotiation." *Id.* at 210-213.

The Court's fleeting reference in *Fibreboard* to the limited assistance provided by its opinion in *Railroad Telegraphers* was entirely appropriate and, we would submit, of equally limited import in resolving the issue presently presented. While it has been observed that the scope of mandatory bargaining under the Railway Labor Act and the National Labor Relations Act are relevantly informational to one another and may, to some extent, converge,[5] this Court in *Railroad Telegraphers* deter-

---

5 The Supreme Court observed, however, in *Chicago & North Western Railway Co.* v. *United Transportation Union,* 402 U.S. 570 n.11 (1971) that "parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes."

mined simply that the union's demand for bargaining was *not illegal* under the Railway Labor Act:

> . . . the union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs. Nothing the union requested would require the railroad to violate any valid law or the valid law of any public agency . . . the union's proposal here was not unlawful. 362 U.S. at 339.

This Court's decision can not soundly be read for the holding that management's business decisions which involve the incidental reduction of bargaining unit jobs should be raised in the negotiating arena as a mandatory subject of collective bargaining. Rather than demarcate the bargaining objective in *Railroad Telegraphers* as mandatory in nature as is mischaracterized by the Respondent and its amici, the Court ruled only that the bargaining demand was not illegal and under the Norris-LaGuardia Act, not subject to an injunctive order. The Petitioner proposes that affording *Railroad Telegraphers* its most sweeping reading for purposes of resolving the case at bar as has been urged by the Respondent, the most favorable inference which can be surmised is that the decision to undertake a partial closing is a *permissive* subject of collective bargaining under this Court's *Borg-Warner* trichotomy.[6] The Respondent's reliance on *Railroad Telegraphers* is therefore severely misplaced. *See* O'Connell, *The Implications of "Decision Bargaining"*, 16th Ann. N.Y.U. Conf. on Labor 99, 109-10 (1963); Note, *Labor Law Problems in Plant Relocation*, 77 Harv. L. Rev. 1100, 1104 (1964).[7] *See also* Goetz, *The Duty*

---

6 The Court in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) decisively expounded upon the distinction between lawful bargaining subjects which were divided into two groupings, including mandatory and permissive (or voluntary) subjects and illegal subjects which neither party can require be entertained in collective bargaining negotiations.

7 O'Connell writes that the "root issue" in *Railroad Telegraphers* was whether the bargaining *demand* was legitimate. "The court," he states,

to Bargain About Changes in Operations, 1964 Duke L.J. 1, 10-12 (concluding that *Railroad Telegraphers* was not "clear judicial precedent" in support of the NLRB's decision in *Town & Country Mfg. Co.,* 136 N.L.R.B. 1022 (1962)[8]); Rabin, *Limitations on Employer Independent Action,* 27 Vand. L. Rev. 133, 156-57 (viewing *Railroad Telegraphers,* in light of subsequent developments, as suggesting "fundamental distinction" between scope of bargaining over contract terms and scope of bargaining as to employer unilateral action).

The unwarrantedly expansive interpretation of *Railroad Telegraphers* urged by the Respondent need be supplanted by the carefully drawn decision and concurring opinion announced in *Fibreboard.* The implementation of this mode of analysis upon the question presented will properly result in the principled determination that an employer's partial closing decision absent union animus and predicated on legitimate business reasons comes within the "core of entrepreneurial control" and is not a mandatory subject of collective bargaining.

"held that it was, but that holding simply set the stage for bargaining over whether the clause would be agreed to by the railroads. . . . But in *Town & Country,* the Board has in effect, taken that kind of clause and *read it into* every contract in the country." O'Connell, *supra,* at 109-10. He concluded that *Telegraphers* affords "no support at all" for the *Town & Country* decision.

The Harvard commentator writes that while *Telegraphers* "may establish that job elimination is a *permissive* subject of bargaining, it does not necessarily support the Board's conclusion that it is a mandatory subject." Note, *supra,* at 1104. Pointing to the different purposes of the Norris-LaGuardia Act, the NLRA, and the RLA, he points out that Norris-LaGuardia may bar an injunction against a strike in support of a permissive subject—itself an unfair labor practice. *Id.*

8 The NLRB relied on *Railroad Telegraphers* deciding in *Town & Country* that an employer had violated Section 8(a)(3) because its subcontracting decision was tainted by union animus and breached Section 8(a)(5) even if its subcontracting decision was taken to avoid violations of ICC regulations or on account of economic concerns. The Board perceived that "the elimination of unit jobs albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act." 136 N.L.R.B. at 1027.

II.

THE DECISION AND PRINCIPLES ANNOUNCED BY THIS HONORABLE COURT IN *DARLINGTON* SUGGEST THAT AN EMPLOYER'S PARTIAL CLOSING DECISION IN THE ABSENCE OF UNION ANIMUS IS NOT A MANDATORY SUBJECT OF COLLECTIVE BARGAINING.

A. The Board's position is inherently inconsistent with the decision of this Court in *Darlington*.

The Chamber of Commerce of the United States has cogently argued that the imposition of a mandatory duty to bargain in the context of the partial closing of a business would be inconsistent with the holding of this Honorable Court in *Textile Workers Union* v. *Darlington Manufacturing Company,* 380 U.S. 263 (1965). In attempting to answer this argument, the Board has advanced a theory which is unsound in both law and logic.

The starting point of the Board's theory is that an employer, acting for legitimate reasons and in good faith, who is contemplating a partial closing of its business, might fruitfully engage in collective bargaining with the representative of the affected employees, with all the benefits that might inure thereto. According to the Board, however, if an employer is motivated by union animus in its decision to close a part of its business, engaging in collective bargaining would be an exercise in futility. Even worse, employees who learn of the employer's true motivation would simply be intimidated. Therefore, the Board concludes that "requiring the employer to discuss his unlawful motives with the union would rarely be useful. . ." and that it would "not always be worthwhile to consider the applicability of Section 8(a)(5) to a plant closure in a case in which discriminatory motivation exists." (Bd. Br. at 33 *et seq.*).

The legal paradox implicit in the Board's position is immediately obvious. An employer who is willing to meet its duty to

bargain and is free of union animus will incur a more extensive bargaining obligation than an employer whose actions are redolent with union animus. Under the Board's theory, an employer would be encouraged to evince anti-union motivation in order to escape any obligation to bargain over the decision to close part of its business. Nothing in the intent of Congress nor in the *Darlington* decision contemplates such an absurd result.

In addition, the Petitioner denies the Board's assertion that *Darlington* speaks only to issues raised in connection with Section 8(a)(3) and does not address itself to the scope of mandatory bargaining under Section 8(a)(5).[9]

In *Darlington,* this Honorable Court specifically recognized that the decision to terminate an entire business is a "managerial prerogative":

> . . . A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither. (*Id.* at 274).

When applying this managerial prerogative in the context of a partial closing situation, this Court limited management's right to take unilateral action only in the presence of union animus which would have the effect of chilling unionism among the company's remaining employees.

---

9 This position shall be more fully developed in the accompanying text of Petitioner's Reply Brief at 9-12, *supra.*

B. In the absence of union animus, there exists no distinction at law or in reason which suggests imposition of a mandatory duty to bargain over a decision to terminate operations upon an employer operating more than one facility. This conclusion is reasonably premised upon the Court's pronouncement in *Darlington* that no such duty exists in the context of an employer's "complete" business closing.

The NLRB's *per se* approach espoused in *Ozark Trailers, Inc.*[10] and its progeny, and the presumptive duty analyses recently offered by two divided federal circuit courts of appeals[11] imposing a mandatory duty to bargain in the partial closing situation is inconsistent with basic entrepreneurial premises developed by this Court in *Darlington, supra.*

The Petitioner fully and enthusiastically embraces the sound reflections of the *Darlington* Court which concluded

> . . . A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither.
>
> So far as legislative manifestation is concerned, it is sufficient to say that there is not the slightest indication in the history of the Wagner Act or of the Taft-Hartley Act that Congress envisaged any such result under either statute.

---

10 161 N.L.R.B. 561, 63 L.R.R.M. 1264, 67 CCH ¶20,834 (1966).

11 Only the divided decision of the court below and the Third Circuit Court of Appeals have adopted presumption analyses that a mandatory duty to bargain over a partial closing decision exists. The vast majority of the circuits have determined since this Court's decisions in *Fibreboard* and *Darlington* were announced that an employer's partial closing decision is not a mandatory subject of collective bargaining as the decision falls within the employer's "core of entrepreneurial control". *See* Pet. Br. at 29-34.

> As for judicial precedent, the Board recognizes that "(t)here is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." 139 N.L.R.B. at 250, 51 L.R.R.M. 378 (380 U.S. at 274).

In the case now before the Court, the employer's animus is not at issue. In fact, the case is devoid of animus and a violative motive is not a component of the record below.[12] The partial closing decision of the Petitioner was legitimatized by its business reason predication and was not tainted by union animus.

The Petitioner recognizes the soundness of *Darlington's* inhibition of an ill-willed employer's ability to chill unionism and employees' section 7 rights by undertaking a partial closing of its enterprise for that purpose. We suggest that the question presented in this case is resolvable, in part, on a sensible extension of principles announced by this Court in *Darlington,* which held that an employer is free to terminate its entire operation for any reason whatsoever including a liquidation motivated by vindictiveness towards a union, and that such action does not constitute an unfair labor practice.[13]

A question which the National Labor Relations Board has never appropriately addressed, however, concerns the paradox in treating employers who partially close and those whom completely terminate operations differentially for purposes of assessing their duty to manditorily bargain over each's closing

---

12 The parties have stipulated prior to the consideration of this case by the court below that section 8(a)(3) animus was *not* at issue. The sole concern of the Second Circuit became whether First National violated section 8(a)(5) of the Act in failing to bargain over what it urged was not a mandatory bargaining subject.

13 The Fifth Circuit Court of Appeals has appropriately observed in *NLRB* v. *Southern Plasma Corp.*, ____ F.2d ____, 105 L.R.R.M. 2782, 2784 (5th Cir. 1980) that this Court made it clear in *Darlington* that an employer may shut down his entire business even if motivated by the most egregious anti-unionism without violating the labor Act.

decision. The explicit refusal of the court below to address this question[14] represents a principal failure with its analysis of the issue now under review.

If as the *Darlington* Court has suggested, a single-facility business or multi-site enterprise can cease operations for *any* reason which may be advanced, it defies logic why in the absence of union animus a multi-site employer should be constrained to be unequivocally required to bargain over its partial closing decision. Petitioner would, of course, recognize the continued inherent soundness of a statutory construction requiring "effects" bargaining in the multi-facility context.[15] The entrepreneur, however, who realizes the generally unwelcomed necessity to cease operating to forestall further economic detriment should not be saddled with a mandatory duty to bargain over its closing decision in the absence of union animus. Such a determination by this Honorable Court would be consonant with the judicial treatment afforded single-site employers and multi-site businesses that completely liquidate under principled management prerogative guidelines announced in *Darlington*.

The incidental loss of employment which results from a business closing is not a welcomed circumstance for labor or for an employer, whose economies dictate such a decision. The

---

14 *See* the decision of the court below contained in Pet. App. A at 11 n.6. The court in the Petitioner's view grievously abdicated from a full and judicious consideration of the question presented when it stated:

> Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case. *Id.*

The submission of the Petitioner remains that a principled determination of the issue before this Court necessarily requires heightened conjunctive consideration of *Fibreboard* and *Darlington* contrary to the undertaking of the Second Circuit.

15 The Board's construction of the Act requiring "effects" bargaining is of no moment in resolving whether an employer's partial closing decision is a mandatory subject of collective bargaining.

Petitioner freely recognizes the *bargainable* nature of an employer's decision to terminate a losing portion of its operations based solely for legitimate business reasons. However, under the mandatory, permissive and illegal subject bargaining trichotomy announced by this Court in *Borg-Warner*[16], the Petitioner submits that a sound reading of *Darlington's* guidelines demarcating a business' entrepreneurial prerogatives to terminate operations absent union animus and the carefully drafted *Fibreboard* decision and concurrence of Justice Stewart reflect the *permissive*[17] and not mandatory nature of the bargaining subject presently considered.

That the partial closing decision here is permissive in nature is further supported by the notion that "Management decisions that fundamentally alter the direction of an enterprise, or

---

16 *See* note 6, *supra,* and accompanying text.

17 The National Labor Relations Board in the *Ozark Trailers* progression of decisions has observably failed to discern that which most of the federal circuit courts of appeals have: while the partial closing decision is certainly a *bargainable* subject as its subject matter is not illegal, it falls within what the *Borg-Warner* Court concluded was a permissive subject of bargaining. As such, the partial closing decision is within the "core of entrepreneurial control" and is clearly not mandatory in nature. An employer need not bargain over its decision to close unless it voluntarily assents to do so since as this Court observed in *Borg-Warner* with respect to permissive subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not agree".

The Respondent and its amici suggest that the Act's legislative history and a speech made by Senator Taft authoritatively broaden to an unchecked degree the array of mandatory subjects of collective bargaining. *See* especially AFL-CIO brief at 22. They seem to urge that but a dichotomy of bargaining subjects exist: legal (mandatory) and illegal. Such an approach, we submit, does not comport with the analysis of this Court in *Borg-Warner.* It is especially significant to note that since *Borg-Warner* was decided in 1958, the Act has been amended from time to time by Congress in various respects. The trichotomy of mandatory, permissive and illegal subjects of bargaining developed by this Court and widely recognized since has not been subjected to further Congressional amendment. Thus, the vitality of the distinction between mandatory and permissive bargaining subjects still flourishes contrary to the implicit suggestion of the Respondent and its amici.

involve significant reallocation of capital generally are not considered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining." *NLRB* v. *International Harvester Co.*, 618 F.2d 85, 89 (9th Cir. 1980) relying on *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. at 223, 85 S. Ct. at 409 (Stewart, J., concurring). The Court of Appeals for the District of Columbia has similarly suggested that major shifts in the capital investment or corporate strategy of a business are not mandatory bargaining subjects, even though they may have a profound incidental effect on the conditions of employment. *Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F.2d 862, 884, 101 L.R.R.M. 2628 (D.C. Cir. 1979).

In a recent noteworthy decision reported as *National Car Rental Systems, Inc.*, 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263 (1980) the National Labor Relations Board held that an employer had not violated section 8(a)(5) of the Act by its sale of a facility and assignment of lease accounts to another company, its relocation to a nearby facility twenty miles distant, and its termination of all unit employees without providing notice to the union or an opportunity to bargain with National Car over the partial closing decision.[18] The decision reports at its outset that National Car operates a *number* of facilities throughout the United States, including *three* in Newark, New Jersey from which it leases and rents cars or trucks. Relying on *General Motors Corp., GMC Truck & Coach Division,*[19] the Board determined that National Car's decision to sell its accounts to another company and to turn over one of its Newark, New Jersey facilities based upon its

---

18 The Board appropriately determined that National Car had violated section 8(a)(5) by its failure to notify the union in a timely fashion and provide it with an opportunity to bargain with respect to the *effects* of its business decision.

19 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971), *enfd. sub nom. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW and its Local 864, UAW* v. *NLRB*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972).

corporate hierarchy's reasoned business judgment to relocate to a nearby Edison plant was a decision "essentially financial and managerial in nature," involving a "significant investment or withdrawal of capital" affecting the "scope and ultimate direction of an enterprise" as stated in *General Motors* and therefore did not require National Car to bargain regarding its decision.[20]

The Petitioner suggests that a doctrinal uneasiness has been articulated by the Board in *National Car* with respect to the mandatory duty to bargain over partial closing decisions established by the Board in 1966 in *Ozark Trailers, supra.* The decision shows that National Car had outlets throughout the country and had two others in Newark when it sold the subject facility in favor of a move to nearby Edison. The employer principally based its decision to close not upon any grand design to fundamentally alter the nature of its dispersed enterprise or to significantly reallocate its capital generally. The Board's decision reports instead that the employer had found the Newark site less than satisfactory. The entrance to the garage was too small and required larger trucks' air deflectors to be dismantled in order to allow their entry into the garage. In addition, the fuel pumps were inconveniently located. The employer sought a replacement or satellite facility for some time before it finally effected the sale of its facility.[21] Such commonplace managerial concerns require, we would submit, a reversal of the decision below to remove an unreasonable and unworkable inhibition imposed upon effective business judgments which come within the core of an employer's managerial prerogatives.

---

20 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263, 1268 (1980).

21 *Id.* at 1265.

III.

THE STATISTICS OFFERED BY THE BOARD AND ITS AMICI TO SUPPORT THE CONTENTION THAT INDUSTRIAL EXPERIENCE ILLUSTRATES THE PROPRIETY OF EXTENDING THE SCOPE OF MANDATORY BARGAINING TO DECISIONS TO CLOSE PART OF A PLANT ARE NOT PROBATIVE

In *Fibreboard*, this Honorable Court considered the realities of industrial experience in gauging whether collective bargaining was a useful problem-solving technique in particular kinds of disputes. (*Fibreboard*, *supra,* at 211). Therefore, in its main brief, the Petitioner cited studies conducted by the United States government to demonstrate that provisions restricting an employer's right to discontinue a portion of its business were contained in only a statistically insignificant percentage of collective bargaining agreements. (Pet. Br. at 20-24).

The Board and the Amici who support its position have devoted a great deal of attention to surveys, academic publications and media pieces which purport to illustrate the propriety of requiring negotiations over a managerial decision to close part of a business. The Petitioner respectfully submits that the material so offered is, at best, not probative.

First, the vast bulk of material cited by the Board and its amici fails to make the crucial distinction between "decision" and "effects" bargaining. This Petitioner has never taken the position that it should be exempted from the legal requirement of bargaining over the effects of its managerial decisions on the work force. Such bargaining, as the Board points out in its brief, can ameliorate the psychological and financial consequences of a decision to close, and can pave the way for the smooth execution of management's plan. (Bd. Br. at 21-24). The Board and its supporting amici, have, however, totally failed to show how "decision" bargaining achieves these mutually desirable objectives better than "effects" bargaining.

Without such a showing and without statistics that discriminate between the two types of negotiations, the material submitted is meaningless and offers no aid in resolving the issues at hand.

Second, much of the material submitted in opposition to the Petitioner only shows that, on occasion, unions have surrendered economic and work rule concessions in order to preserve the jobs of bargaining unit members employed by ailing companies. This information does not bear on the case at bar. The Respondent has failed to show that concessions by unions have been made in response to managerial proposals to close portions of business enterprises. Without this requisite specificity, the material on industrial experience is offered out of context and loses all relevance. This Honorable Court and the Petitioner are left to speculate concerning the frequency and efficacy of "decision" bargaining in partial closing situations.

Finally, it must be noted in passing that, even if Respondent could document instances in which negotiations took place over the decision to close part of a business, such information could not be accepted as a genuine indication of industrial experience. For many years, the issues of decision bargaining and partial closings have been mired in legal controversy. Under these circumstances, many responsible employers have engaged in "decision bargaining" in order to comply with their perception of the law and not because they really believe that the bargaining process could produce results of sufficient weight to effect the contemplated managerial decision. Therefore, the proffered data is "tainted" and carries little, if any, probative force in the consideration of this case.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit in the instant matter should be reversed and the order of the National Labor Relations Board should be denied enforcement.

Respectfully submitted,

SANFORD E. POLLACK
STUART M. KIRSHENBAUM
PERRY S. HEIDECKER

MILMAN, NANESS & POLLACK
1175 West Broadway
Hewlett, New York 11557
(516) 569-1288

Attorneys for Petitioner

MOTION FILED
APR 1 1981

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW AS AMICI CURIAE

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(Counsel of Record)
(202) 637-5390
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037
Attorneys for AFL-CIO

JOHN A. FILLION
LEONARD PAGE
MICHAEL NICHOLSON
8000 E. Jefferson Ave.
Detroit, Michigan 48214
Attorneys for International Union, UAW

TABLE OF CONTENTS

	Page
MOTION:	i
Interest of The Amici Curiae	i
Points to be Covered in the Brief	iii
BRIEF:	1
Introduction and Summary of Argument	1
Argument	5
Conclusion	30

TABLE OF AUTHORITIES

CASES:

American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 23

Brockway Motor Trucks v. NLRB, 582 F.2d 720 (C.A. 3) 28

Bus Employees v. Missouri, 374 U.S. 74 22

Bus Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 22

Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 19

Chemical Workers v. Pittsburgh Glass, 404 U.S. 157 18

Connell Co. v. Plumbers and Steamfitter 421 U.S. 616 14

Fibreboard Products Corp. v. Labor Board, 379 U.S. 203, affirming East Bay Union of Machinists Local 1304 v. NLRB, 116 U.S. App. D.C. 198, 322 F.2d 411 ..... 4, 5, 13, 14, 16, 20, 24, 26, 28, 30

Ford Motor Co. v. NLRB, 441 U.S. 488 ..... 17, 19

Inland Steel Corp., 77 NLRB 1, enf'd. 170 F.2d 247 (C.A. 7), cert. denied, 336 U.S. 460 27

Jacobs Mfg. Co., 94 NLRB 1214, enforced, 196 F.2d 680 (C.A. 2) 7

Page

Labor Board v. Insurance Agents, 361 U.S. 477 ..... 3, 5, 19, 22

Labor Board v. Jones & Laughlin, 301 U.S. 1 ..... 4, 20, 23

Labor Board v. Katz, 369 U.S. 736 8

Labor Board v. Rice Milling Co., 341 U.S. 665 14

Massachusetts Trustees v. U.S., 377 U.S. 235 28

National Labor Relations Board v. American National Insurance Co., 343 U.S. 395 ..... 7, 9

Newspaper Pub. Assn. v. Labor Board, 345 U.S. 100 22

NLRB v. Operating Engineers, 400 U.S. 297 14

Porter Co. v. NLRB, 397 U.S. 99 ..... 3, 5, 19, 20, 22, 23

Railroad Trainmen v. Terminal Co., 394 U.S. 369 .. 14, 15

Teamsters Union v. Oliver, 358 U.S. 283 16

Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 ..... 3, 4, 5, 10, 11, 12, 13, 15, 23, 24, 25

Textile Workers v. Burlington Mfg Co., 380 U.S. 263 21

Timken Roller Bearing Co., 70 NLRB, 500 enf. den., 161 F.2d 949 (C.A. 6, 1947) 16

TVA v. Hill, 437 U.S. 153 25

Woodwork Manufacturers v. NLRB, 386 U.S. 612 .. 14

STATUTES:

National Labor Relations Act, 49 Stat. 449, 61 Stat. 449, 61 Stat. 136, 79 Stat. 519, 29 U.S.C. § 141 *et seq.*

§ 1 ..... 20, 22

§ 2(9) 15

§ 7 ..... 14, 28

Page

§ 8(a)(3) 21, 22

§ 8(5) 4, 5

§ 8(a)(5) 5. 6, 8, 15, 28

§ 8(b)(3) 5, 28

§ 8(b)(4) 14

§ 8(b)(7) 14

§ 8(d) ..... *passim*

§ 8(e) 14

§ 9(a) 4, 5, 6, 15

§ 13 ..... 14, 28

Norris-LaGuardia Act § 13, 47 Stat. 70, 29 U.S.C. § 113(c) 4, 11, 13, 15

Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 151 *et seq.*:

2, First 4, 10, 12, 13, 17

LEGISLATIVE HISTORY:

H. Rep. No. 1371 on S. 1958, 74th Cong., 1st Sess. .. 21

79 Cong. Rec. 9682 (June 19, 1935) 4, 21

Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948) ..... *passim*

MISCELLANEOUS:

BNA Daily Labor Report (September 26, 1980) 29

Chamberlain, N. The Labor Sector (1965 ed.) 27

Cox and Dunlop, the Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv. L. Rev. 1097 (1950) 7

Firestone Division is Planning to Close Plant in Indiana, Wall Street Journal (October 30, 1980) 29

Henle, P., Reverse Collective Bargaining? A Look at Some Union Concession Situations, Industrial

& Labor Relations Review, Vol. 26, No. 3 (April 1978) 29

Now It's Pay Cuts Instead of Raises, U.S. News & World Report, (February 9, 1981) 29, 30

Steelworkers Agree to Delay Pay Raises, Associated Press (September 10, 1980) 29

Unions Giving Back Contract Gains to Save Jobs in Troubled Industries, Washington Post (August 4, 1980) 29

Unions Making Contract Concessions, Associated Press (September 10, 1980) 30

Weber A. and Taylor D., Procedures for Employee Displacement: Advance Notice of Plant Shutdown, Journal of Business (July, 1963) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union, UAW (UAW), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the respondents in this case.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union, UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The AFL-CIO and the UAW are vitally interested in the scope of collective bargaining, which is at the heart of the National Labor Relations Act (hereafter "NLRA"), and the protections given to employees by that Act. Any decision by this Court which would remove "wages, hours, and other terms and conditions of employment" (§ 8(d) of the NLRA) from collective bargaining would severely undermine the rights granted workers in 1935 and preserved in the 1947 amendments. A decision to this effect with respect to bargaining about plant closings, particularly where there are no contractual impediments to such bargaining, would have a severely adverse effect on workers who are particularly vulnerable and needful of the rights which Congress has vouchsafed them.

The UAW represents many workers in industries which are presently in a state of economic decline; the problem of plant closings and economic dislocation, addressed in this case, has had a particularly severe impact on these workers. UAW has, as a matter of policy and industrial practice, sought to engage in bargaining with employers over potential decisions to close facilities where UAW is the statutory representative, and if possible, to prevent such closings. The UAW's experience has been that negotiations over plant closings are fruitful; such bargaining has often avoided closings, or at the very least promoted mutual understanding which has eased the economic and psychological impact on the workers, with beneficial effects for employers as well.

The negotiations between UAW and Chrysler prior to the passage of the Chrysler Loan Guarantee Act of 1979, P.L. 96-185 (96th Cong., 1st Sess.), is one of the most timely and instructive examples of such bargaining. Chrysler's financial difficulties were not rooted in its "labor costs", since those costs were equal to its competitors. Rather. a combination of inadequate product lines, chang-

ing market demands, the energy crisis, massive retooling costs, and cash flow and debt structure problems brought Chrysler to the brink of business failure in 1979. Recognizing Chrysler's financial problems, and to protect the jobs of its members, UAW agreed to $203 million in wage and benefit concessions, and $100 million in pension funding deferrals. UAW took this action without government compulsion, as a result of free collective bargaining.

POINTS TO BE COVERED IN THE BRIEF

The tendered brief supports affirmance of the judgment below, as does that of the respondent, the National Labor Relations Board. The statutory materials and judicial precedents on which the decisions of the Board and of the Court of Appeals rest, of course, play a dominant role in our brief as well. However, our brief adds to that filed by the Board in several respects which we submit will aid the Court in its consideration of this important case.

First, we stress the immediate context in which this case arose—that is, bargaining during a time when the employees were represented by a union, but their terms and conditions of employment were not fixed by an existing contract. It is our submission that the duties of the parties under those circumstances are materially different from those where a contract is in effect, and that some of the concerns which have been expressed regarding the consequences of recognizing that partial closings which result in the loss of jobs are a mandatory subject of bargaining have failed to give adequate attention to this distinction.

Second, our brief emphasizes the complex nature of collective bargaining as contemplated by Congress, and articulated by this Court, particularly in *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1; *Labor Board* v. *Insurance Agents*, 361 U.S. 477; and *Porter Co.* v. *NLRB*, 397 U.S. 99. Specifically, we stress that while the duty to bargain was created in part because it was expected that it would often result in the peaceful resolution of labor-management controversies, it was also understood that agreements might

not always result and that collective bargaining entails the right of each side to use economic weapons in support of its bargaining position. From this fundamental statutory policy we draw the conclusion that the finding below that collective bargaining in this particular dispute could have achieved a mutually acceptable solution is not necessary to support the conclusion that the partial closing in this case is a "term and condition of employment" under § 8(d) and that the employer here was under a duty to bargain. Of course, the fact that the Board made a finding which is irrelevant as a matter of law does not undermine the result which it reached, see, *e.g., Massachusetts Trustees* v. *U.S.*, 377 U.S. 235, 246. However, the basis of the Court's decision is likely to affect the Board's approach and the outcome of other cases. Cf. *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 398 (Jackson, J. concurring).

CONCLUSION

For the foregoing reasons we request that the present motion to file this brief *amici curiae* should be granted.

Respectfully submitted,

J. Albert Woll
815 15th Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 16th Street, N.W.
Washington, D.C. 20006
(Counsel of Record)
(202) 637-5390

George Kaufmann
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for AFL-CIO

John A. Fillion
Leonard Page
Michael Nicholson
8000 E. Jefferson Ave.
Detroit, Michigan 48214

Attorneys for International Union, UAW

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO and UAW in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

A. Normally, as the instant case shows, an employer decision to terminate an operation is equally an employer decision to terminate the jobs of the employees who were manning that operation. Where there is such a conjunction—where the decisions to close and to discharge are so

inextricably intermixed that they are truly one—we submit that the termination decision (as we shall henceforth refer to it) concerns a "condition of employment" as that term is used in § 8(d) of the National Labor Relations Act as amended (hereafter "NLRA") and is therefore a mandatory subject of bargaining between management and labor.

Employer actions, which result in termination of employment are well within the normal meaning of the phrase "conditions of employment." Moreover, as a practical matter, in an uncertain world it is entirely rational for workers to conclude that a collectively bargained agreement that sets high wages, a sound pension program, an excellent safety system and so on, but does not place any limit on the employer's right to end all those benefits by ending the operation and eliminating their jobs is likely to be illusory.

It would be a cruel irony if § 8(d) were to be interpreted to limit such employees to a bargaining exercise that produces a piece of paper of uncertain worth and does not even provide them the *opportunity* to safeguard what they regard as their most pressing need—job security. Certainly it is more in accord with the basic theory of the NLRA that employees who desire certain job security guarantees—that there will be no closing during the contract term, or that there will be a process of notice and consultation prior to a closing, or if the employer has a number of operations that there will be transfer rights, or that there will be certain payments or other benefits on a closing—are entitled to seek those protections through collective bargaining. The employer may choose to agree or disagree. If there is agreement, that forwards Congress' judgment that collective bargaining is a sound method of keeping industrial peace. If there is disagreement, then the parties are remitted to the use of their economic weapons. That forwards Congress' judgment that a system in which management and labor work out their own problems through tests of strength is superior to the alternatives—first, government dictation of a solution, an approach which has been deemed incompatible with the private enterprise system, or, second,

government protection of the right of employers to dictate terms and conditions of employment and government suppression of the right of employees to protect and advance their job interests, the approach found wanting in the first thirty years of this century and which the Congress that passed the NLRA was intent on ending.

B. It facilitates analysis—indeed, we believe it is absolutely essential to a proper understanding of the problem presented—to focus on the limited legal consequences of a holding that termination decisions are a mandatory subject of bargaining. For the chief argument raised against such a holding has been that it would unduly hamper management in making entrepreneurial decisions, particularly to meet pressing business exigencies. But where the decision in question is to terminate represented employees' jobs, Congress has made the judgment that management and labor must protect and advance their own interests and that it is not the province of government to declare that certain decisions which result in job loss are management "prerogatives" and thereby strip employees of their right to protect their jobs at the bargaining table or in economic warfare. Of course, Congress has not made the judgment that the employees are necessarily entitled to prevail; the outcome may well depend on the relative economic strengths of the parties. *See, e.g., Labor Board* v. *Insurance Agents*, 361 U.S. 477; *Porter Co.* v. *NLRB*, 397 U.S. 99.

The foregoing propositions are elaborated in Part I of our argument.

II.

In Part II of our argument we show that the result in this case is controlled by the result and rationale of *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 ("*Telegraphers*"). The Court there held that a union demand to bargain about the closing of railroad stations was a mandatory subject for bargaining under the Railway Labor Act because such closings would result in the loss of bargaining unit jobs and that a strike to enforce such a demand was immune from injunction under the Norris-LaGuardia Act.

We show first that, in a holding followed in *Fibreboard Products Corp* v. *Labor Board,* 379 U.S. 203, 210, the *Telegraphers* Court concluded that such a demand encompassed "terms and conditions of employment" under the Norris-LaGuardia Act. This language was adopted in § 8(d) of the National Labor Relations Act.

We show next that the legislative history of the 1947 amendments establishes that the foregoing language was deliberately chosen in drafting § 8(d), under circumstances which preclude petitioner's narrow construction of that provision. These circumstances include the source of that phrase in the Norris-LaGuardia Act and the Wagner Act; in the latter, it appeared not only in the definition of "labor dispute," but also, by virtue of the interrelationship of §§ 8(5) and 9(a), in the provision setting the employer's duty to bargain. They also include the Senate's preference for "terms and conditions of employment" over "working conditions," which defines the scope of bargaining under the Railway Labor Act, and which was feared to be narrower, as well as the Conference Committee's rejection of the House proposal to narrow the subjects of collective bargaining. Finally, they include emphatic reaffirmance of the Wagner Act's policy which favors free collective bargaining. As the 1935 and 1947 reports and debates show, this policy rejects government control of the results of collective bargaining, and provides that control through the process of negotiation between management and labor, reserving to each the right to use economic weapons in order to gain acceptance of its bargaining position. In short, the duty to bargain does not entail the duty to agree. This, as a colloquy in the 1935 House debates shows, was understood to be the employer's defense against being compelled by the Act to keep a plant open. See 79 Cong. Rec. 9682 (June 19, 1935). See also *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45. Section 8(d) was adopted in 1947 in part to reinforce the proposition that the Board may not compel agreements. See *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 488-490; *Porter Co.* v. *Labor Board,* 397 U.S. 99, 105-106, 109.

Finally, we show that petitioner cannot prevail on any principle of management "prerogative." Here again, *Telegraphers* is directly in point because that case expressly disapproved the reasoning of the Seventh Circuit decision which had rested on the same theory. Moreover, insofar as the "prerogative" argument rests on the concurring opinion of Justice Stewart in *Fibreboard, supra,* it is by no means clear that the present case is within the "core of entrepreneurial control" as Justice Stewart used that phase (379 U.S. at 223). Moreover, we submit, with all respect, that if the present case is within that concept and would be outside the duty to bargain under the views expressed in that opinion, those views are contrary to the judgments which Congress has made and has expressed in § 8(d).

ARGUMENT

I.

A. A holding that the employer must bargain over the termination decision in a case like the present would not put any automatic restriction upon his freedom of action. His bargaining obligations arise from § 8(a)(5), as the union's correlative duties arise from § 8(b)(3). If, as we submit, such decisions are a subject which §§ 8(d) and 9(a) make bargainable, §§ 8(a)(5) and 8(d) impose upon the employer the duty, under some circumstances, to negotiate with the bargaining representatives concerning such decisions. Similarly, the representative must negotiate in good faith about the decision if the employer so proposes.

Those obligations arise when the employer and union are negotiating a *new* collective agreement. That is the *only* conclusion, however, that follows automatically upon a holding that termination decisions are a subject of mandatory negotiation.

B. The conclusion that termination decisions are a subject of bargaining comprehended within §§ 8(d) and 9(a) does *not* automatically lead to the further conclusion that an

employer must always consult with the union before a partial closing. The legality of unilateral action depends upon the interpretation of § 8(a)(5), as applied to each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry. On the other hand, the necessary effect of construing conditions of employment so as to exclude such decisions is to relieve the employer of any legal obligation *ever* to negotiate about any restriction upon an unlimited prerogative.

This is not a purely technical distinction. Labor-management negotiations concerning termination decisions may take either of two forms.

The bargaining may deal with the procedure and substantive rules to be followed during the term of the agreement when the prospect of a closing becomes real—provisions to be written into a collective agreement governing the employer-employee relationship for a substantial period of time. In those contract negotiations there is no problem of immediate operational decisions and no greater need for unilateral action than in fixing any other term of employment.

On the other hand, the issue may arise in immediate concrete terms without relation to the periodic negotiation of collective agreements and in a context in which business exigencies would necessitate prompt action or in which there would not be ample time for detailed negotiation.

Moreover the closing problem may arise (1) during the term of a collective agreement or (2) in the absence of an existing agreement. The legal consequences are entirely distinct.

(1) If the parties deal with termination decisions in their collective agreement, the problem of unilateral action is removed to the sphere of contract administration. One of the strengths of collective bargaining has been its capacity for creating procedures and substantive rules suited to the

needs of the industry and even the particular business. While one extreme calls for vesting absolute freedom in management and the other extreme bars terminations without the consent of the union, there is a wide range of intermediate accommodations appropriately securing the most vital interests of both employers and employees according to the precise industrial circumstances. The place to work out a framework for possible future termination decisions that takes into account the needs of the business, and the host of other relevant considerations varying from business to business, is in the periodic contract negotiations.

Of course if he is acting in good faith, the employer is legally free to negotiate even for a clause securing him the right to terminate at will. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. And while management may not always be able to negotiate the kind of clause that it desires, because of the opposite interests of the employees, the accommodation resulting from the free interplay of the opposing forces is likely to be a better arrangement for the particular parties, in their peculiar situation, than any solution the law might dictate as a uniform rule for all industries.

The situation is more complicated if the parties sign a collective agreement without express provision governing termination decisions. One solution is to treat the parties as if no agreement were in force. Another view is that there are many matters, which inevitably pass unmentioned, as to which every contract necessary assumes a continuation of the *status quo*. Compare Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097; *Jacobs Mfg. Co.*, 94 NLRB 1214, *enforced*, 196 F.2d 680, 683-684 (C.A. 2).

That difficult problem, however, is not involved in this case. There is no necessary relation between the only issue raised by petitioner—are termination decisions within the subject matter of statutory bargaining—and the question, what effect has a collective agreement upon the duty to

bargain about subjects not mentioned therein. The latter question is not confined to such decisions; it has arisen even more sharply with reference to conceded subjects of collective bargaining such as pensions and insurance. It need not be decided here because petitioner acted when there was no collective agreement in force.

(2) In the absence of an existing agreement the problem of unilateral action must be resolved solely by reference to the statutory duty "to bargain collectively." This Court has not had occasion to examine the problem in all its ramifications, and this case does not raise any new facets of the problem. In *Labor Board* v. *Katz*, 369 U.S. 736, the Court held that "an employer's unilateral change in conditions of employment under negotiation is • • • a violation of § 8(a)(5)" (*id.* at 743) because it is "tantamount to an outright refusal to negotiate that subject" (*id.* at 746), but the Court reserved judgment as to whether "there might be circumstances which the Board could or should accept as excusing or justifying unilateral actions" (*id.* at 748).

In the instant case the employer simply refused to meet at all or even to respond to the union's request for a meeting. In that situation we believe that the employer should not be heard to claim justification after the fact.[1]

C. Just as §§ 8(a)(5) and 8(d) leave a measure of flexibility with respect to unilateral action, so are the statutory requirements concerning the character and length of negotiations adaptable to the exigencies of the particular business situation. An employer is under no duty to yield to the union (nor is the union under such a duty).

---

[1] While the Petitioner claims that notice and bargaining over plant closings will lead to loss of productivity or sabotage, or to the sudden loss of key workers, industrial experience teaches exactly the opposite. See A. Weber and D. Taylor, *Procedures for Employee Displacement: Advance Notice of Plant Shutdown*, Journal of Business, (July 1963) pp. 312-313.

The amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" varies with the circumstances. Ordinarily, before the employer reaches a final decision to take action, he must meet with the union, if it so desires, and give it the reasons for his proposed action. He must hear in good faith any union arguments for a contrary policy. Alternatives must be explored. Then either the employer and union will agree or the employer will make its decision and the union may resort to self-help. But we recognize that in certain circumstances the employer may act sooner. There may be an emergency that makes it impossible to consult the union before taking action.

Moreover, even where the employer is able to, and does, meet with the union before reaching a final decision, the amount of negotiation required in order to satisfy the statutory standard must take into account the exigencies of the business and the potentials of further negotiations. If the economic forces are truly pressing and the union can offer no compensating concession, an "impasse" in the negotiations that would permit the employer to take action may be reached far sooner than where there was ample time for negotiation or the union was in a position to alleviate the conditions which motivated the employer's proposed action, and was advancing meaningful alternatives. The Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *American National Insurance Co., supra,* 343 U.S. at 404.

D. The freedom to negotiate mutually satisfactory arrangements concerning future terminations meets many of the fears that have been expressed concerning the danger that the necessity of collective bargaining over such decisions may unduly hamper management in meeting business opportunities and exigencies. Additional flexibility is introduced both by the legal principles governing the right to take unilateral action and by the kind of negotiation that is required to satisfy the obligation to bargain in good faith. No doubt employers remain subject to some restric-

tions upon the kind of freedom that might best serve their interests, even assuming that employers always acted fairly and wisely without the necessity of consulting the representatives of their employees. The same argument can be made, upon the same assumption, about a host of traditional subjects of collective bargaining. The judgment Congress expressed in enacting the NLRA was that the interests of employees should be consulted, and that the public interest, which includes the interests of both employers and employees, would be best served by subjecting problems between labor and management to the mediatory influence of collective bargaining.

II.

The sole issue in this case is whether an employer who decides to close a part of his operations and thereby to reduce the number of bargaining unit jobs is ever required to bargain with the representative of those employees about that decision. The controlling precedent is the decision of this Court which confronted that precise question and squarely answered it in the affirmative—*Order of Railroad Telegraphers* v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330 (hereafter "*Telegraphers*").

A. In the *Telegraphers* case the railroad had proposed to discontinue a number of its stations. The union, which represented station agents, responded by proposing a contract clause which would state that no job "will be abolished or discontinued except by agreement between the carrier and the organization," and threatened to strike in support of this demand. The Seventh Circuit decided that this demand was beyond the scope of bargaining under the Railway Labor Act (45 U.S.C. § 151 *et seq.*):

> Certainly the Railway Labor Act does not divest a carrier of the right to manage and control the administrative functions of its business enterprise and conduct its business operations without exercise of a veto power by the Union. Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. • • •

> In short, this is an attempt by the Union to arrogate to itself the prerogatives that have been traditionally and rightfully management's, while, at the same time, assuming none of the corresponding burdens and responsibilities. [*Chicago & North Western Ry. Co.* v. *Order of Rail. Tel.*, 264 F.2d 254, 258 (C.A. 7), *reversed*, 362 U.S. 330.]

Elaborating on its views concerning management "prerogatives", the Seventh Circuit said:

> The proposed contract change in the case before us represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations. It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than that proposed here, would constitute a bargainable issue under the Railway Labor Act. [264 F.2d at 259]

On this basis, the Seventh Circuit thereupon concluded that the union's demand was:

> completely outside the ambit of "rates of pay, rules or working conditions", as those words are used in the Railway Labor Act, * * * and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable. [264 F.2d at 260, citation omitted]

The Court of Appeals thereupon enjoined the union's strike in support of the no-closing proposal.

This Court reversed the Seventh Circuit. The *Telegraphers* Court held, first, that the strike could not be enjoined in light of Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), which includes in the definition of a "labor dispute" safeguarded from judicial governance "any controversy concerning terms and conditions of employment." The Court held:

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad.

• • •

> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that "[c]ollective bargaining as to the length or term of employment is commonplace," is not challenged.
>
> We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations." The Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. The Railway Labor Act safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining. [362 U.S. at 335-337, footnotes omitted]

In addition, the Court held that the union's demand was not unlawful, but rather was a legitimate subject for collective bargaining under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, which requires bargaining with respect to "rates of pay, rules, and working conditions."

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." [362 U.S. at 339]

Petitioner and the *amici curiae* supporting its position maintain a "sullen silence" about *Telegraphers*; that decision is not cited in any of their briefs. Yet *Telegraphers*

controls the present case: 1) by its analysis of "terms and conditions of employment"; 2) by its holding that partial closings which result in loss of jobs are within the duty to bargain established by the Railway Labor Act; and 3) by its rejection of the Seventh Circuit's "management prerogatives" reasoning, which pre-echoes the principal theme sounded in the arguments on petitioner's side.

B. The holding in *Telegraphers* that the union's bargaining demand there was within the phrase "terms and conditions of employment" provides conclusive support for the proposition that the union's proposal here is within the "terms and conditions of employment" which are mandatory subjects of bargaining under § 8(d) of the National Labor Relations Act. That this term has the identical meaning in § 13(c) of Norris-LaGuardia and § 8(d) of the NLRA was recognized in this Court's opinion in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203 (hereafter *"Fibreboard"*).

This Court said:

> The subject matter of the present [subcontracting] dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. [379 U.S. at 210.]

Petitioner recognizes that it must lose this case under what it terms a "literal approach to bargainability determinations involving closings of a facility in whole or in part," which it urges the Court to reject. (Pet. Br. 15, upper case omitted.) [2] But the legislative history shows that Congress deliberately chose these words against a back-

---

[2] It may be useful to contrast the present case with the occasions on which the Court has expressly rejected a literal reading of the

ground that leaves no room for a narrowing of their terms by construction. Moreover, that history reinforces our submission that the *Telegraphers* precedent governs in this case.[3]

Petitioner asserts that "Restriction of mandatory bargaining to 'wages, hours, and other terms and conditions of

---

NLRA. In *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616, the Court held that the construction industry proviso to § 8(e), did not protect a particular subcontracting agreement at issue there although "On its face, the proviso suggests no such limitation." (*id.* at 628). But the Court did so only after determining from the legislative history that that agreement was not "related to any of the[] policies" which the proviso was intended to advance (*id.* at 631), and that approval of the agreement would actually undermine "one of the major aims of the 1959 Act", which had been effectuated by the enactment of § 8(b)(7) (*id.* at 632). So, too, in *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619, cited in *Connell* (421 U.S. at 628) the Court traced not only the 1959 legislative history of § 8(e), but the prior relevant course of labor legislation to establish that that provision, despite its language, adhered to "the distinction between primary and secondary activity" (*Id.* at 633-640). That distinction was first drawn by this Court despite the language of § 8(b)(4) in *Labor Board* v. *Rice Milling Co.*, 341 U.S. 665, 672-673 in light of the legislative history of § 8(b)(4) and the protection of right to strike in §§ 13 and 7 of the Act. Cf. *NLRB* v. *Operating Engineers*, 400 U.S. 297, 302-305 where secondary activity was prohibited, although its object was not literally covered by the statutory phrase "cease doing business."

[3] We are, of course, cognizant of Justice Harlan's caution "that the National Labor Relations Act cannot be imported wholesale into the Railway Labor arena" (*Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383), an observation which is equally instructive in the reverse direction. But *Fibreboard* itself shows, by example, that Railway Labor Act precedents may appropriately be followed in determining the scope of bargaining under the NLRA. Indeed, as we shall show (pp. 16-17, *infra*), the words used in the NLRA were substituted in the Senate Bill (which became law in this respect) for the comparable phrase which is used in the RLA, with the understanding that the NLRA language was more expansive.

employment' was the product of the Taft-Hartley amendments adopted by the 80th Congress in 1947." (Pet .Br. 15) This assertion is misleading, to put it charitably. The 1947 Congress deliberately rejected the Hartley Bill's proposed restrictions on mandatory bargaining, and instead adopted the phrase "wages, hours and other terms and conditions of employment" from the Wagner and Norris-LaGuardia Acts, in which this language was understood to be expansive. Indeed, the 1947 history shows that Congress used the phrase "conditions of employment" to preclude a narrow construction of the scope of collective bargaining.

First, as we have seen, the phrase "conditions of employment" had its source in the definition of labor disputes in § 13(c) of the Norris-LaGuardia Act, of which Mr. Justice Black wrote in *Telegraphers*: "Congress made the definition broad because it wanted it to be broad." (362 U.S. at 335, quoted at p. 11, *supra*.) This definition of "labor dispute" was adopted *in haec verba* in § 2(9) of the Wagner Act and retained in full in 1947. So, too, the 1947 amendments retained what is now § 8(a)(5) [4] which, in establishing the duty to bargain, incorporates § 9(a) by reference, and (insofar as here pertinent) the language of § 9(a) itself:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * * "

Since the employer's duty to bargain under the Wagner Act extended no further than § 8(5), as read in light of § 9(a), petitioner is in error in contending that "no such

---

[4] "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

limitation [as it seeks to find in § 8(d)] was included in the Wagner Act." (Pet. Br. 15.) [5]

Of critical importance too is the fact that in considering what became § 8(d) of the Act, the 1947 Congress considered and rejected proposals for narrower words, which were offered in an effort to curtail the scope of labor-management negotiations. The bill which passed the House (the Hartley bill) had enumerated the particular subjects which were to be encompassed within the term "collective bargaining" and to constitute the scope of bargaining required by the Act.[6] The Senate Labor Committee bill followed the form of § 8(d) as enacted. To underline the breadth of its approach the phrase "conditions of employment" was used by the Senate in preference to "working conditions" (used in the Committee bill) in response to Senator Wagner's fear that the term "working conditions" would narrow the scope of collective bargaining. Senator Wagner said:

> By substituting the narrower term "working conditions" for the present broader term "conditions of employment," the bill would narrow the scope of col-

---

[5] Because the Board was confronted with the same issue under the Wagner Act, and because § 8(d) retained the critical language "other conditions of employment", pre-Taft-Hartley decisions interpreting the phrase "other conditions of employment" have been followed by this Court as pertinent precedents in construing § 8(d). See the citation of *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 518, *enforcement denied on other grounds*, 161 F.2d 949 (C.A. 6, 1947), in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295 and *Fibreboard, supra*, 379 U.S. at 213.

[6] H.R. 3020, 80th Cong., 1st Sess., § 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167 (hereafter "Leg. Hist."); House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. Section 8(b)(3) of the Hartley bill would have prohibited "strike[s] or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provision which under § 2(11) is not included as a proper subject matter of collective bargaining." 1 Leg. Hist. 179.

> lective bargaining to exclude many subjects, such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism. [1 Leg. Hist. 998.]

The Senate's acceptance of Senator Wagner's point is of particular importance in this case, because the term "working conditions" is that which is used to define the duty to bargain under § 2, First of the Railway Labor Act (45 U.S.C., § 152, First). Section 2, First, of course, was held to encompass, and thus to require bargaining about, the station closings in *Telegraphers,* 362 U.S. at 339.[7] In the light of Congress' conscious choice of what the legislature considered to be the broader phrase "condition of employment" it would be a gross distortion of the Congressional intent to hold that a partial closing is not a mandatory subject of bargaining under § 8(d).

This Court recognized in *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495-496, that the Hartley Bill's "attempt to 'strait-jacke[t]' and to 'limit narrowly the subject matters appropriate for collective bargaining' • • • was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d)" (citations omitted).

The *Ford Motor* opinion drew from this 1947 history the lesson "that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." (*Id.* at 496.) That is a lesson which cuts strongly against petitioner's attack

---

[7] The Court said:

> "Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First."

on the Board's bargaining order which is, to say the least, "reasonably defensible [and therefore] should not be rejected merely because the courts might prefer another view of the statute." (*Id.* at 497.) Moreover, petitioner cannot claim that it comes within any of the exceptions there articulated to the rule of deference; on the contrary, one of those exceptions lends independent support to the conclusion reached by the Board here. Whereas in *Chemical Workers* v. *Pittsburgh Glass,* 404 U.S. 157, the Board had "stretched beyond its plain meaning" the term "employee" which was critical there (see *id.* at 166), the Board's interpretation of the phrase "conditions of employment" in the present case is, as we have seen (and petitioner does not dispute) in accord with the plain and accepted meaning of that phrase.

While stressing that the 1947 legislative history showed that Congress retained the primacy of the Board in defining the subjects of bargaining, the Court in *Ford Motor* also noted the relevance of that history to the substantive issue of the scope of bargaining by quoting two earlier decisions:

> See also *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157, 178 (1971) ("Section 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining"); *East Bay Union of Machinists* v. *NLRB,* 116 U.S. App. D.C. 198, 201, 322 F.2d 411 ,414 (1963) (Burger, J.), aff'd *sub nom. Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) ("The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions"). [441 U.S. at 496-497, n. 9]

Indeed, while we submit that the foregoing history compels the conclusion opposite to petitioner's plea that the literal language of § 8(d) be given a constricted reading, namely that Congress intended that it be given its full scope, that conclusion is further buttressed by the legisla-

tive history of another portion of § 8(d), as well as by a key statement of Senator Taft concerning the policy and philosophy underlying the entire Act.

Section 8(d) also provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." As this Court explained in *Porter Co.* v. *NLRB*, 397 U.S. 99, 106:

> In discussing the effect of that amendment, this Court said it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404 (1952). Later this Court affirmed that view stating that "it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 487 (1960).

See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 219 and the additional cases cited, *id.*

This express restriction is not inconsistent with the grant to the Board, declared in *Ford Motor Co., supra*, of primary responsibility to determine the subjects of bargaining, it having been recognized since the Wagner Act that the scope of mandatory bargaining is not to be universal. For in exercising this responsibility the Board must—as it has here—respect the restrictions which § 8(d) does impose, and therefore may not, in the guise of defining the subjects of bargaining, cut into "free collective bargaining," *Carbon Fuel Co.*, 444 U.S. at 218, any more than it may do so in exercising its authority to enforce "the principle that [the parties] are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *Insurance Agents*, 361 U.S. at 486." After all, in *Insurance Agents*, this Court, reversing the Board, relied significantly on the insight that if in regulating the duty to bargain "the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the

substantive terms on which the parties contract," contrary to the fundamental policy of the Act. (*Id.* at 490. See also *id.* at 497, 498.)

The legislative history of the 1947 amendments shows also that Congress deliberately reaffirmed the statement of Congressional policy which encourages collective bargaining, although that statement would have been eliminated under the House Bill (see 1 Leg. Hist. 160). Section 1 declares that a prime purpose of the National Labor Relations Act is to encourage the settlement of industrial disputes by the process of negotiations between employers and the representatives of employees. As the Court said in *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 42, "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." See also *Fibreboard*, 379 U.S. at 211. The Court also said in *Jones & Laughlin:*

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. [301 U.S. at 45.]

This passage was quoted with approval in *Porter*, 397 U.S. at 105.

In *Porter*, the Court set forth some of the reports and debates on the Senate side. The view of the House was entirely in accord. We quote one colloquy, which embodies that position and given the example considered is of special interest here:

> Mr. Taylor of Tennessee. Is there anything in this bill to prevent an operator from closing his plant?
>
> Mr. Griswold. There is nothing in the bill to keep an operator from closing his plant. There is nothing in the

> bill that says you shall reach an agreement—nothing of that sort. It simply provides that labor may bargain collectively. The bill does not fix hours, wages, or working conditions, nor does it allow any Government agency to do so. The bill does not require any employee to join any labor organization. Nothing in the bill compels any employer to make any agreement about anything pertaining to wages, hours, or working conditions in any plant any place. [79 Cong. Rec. 9682 (June 19, 1935.] [8]

All we contend here is that the 1935 Act and the present law require bargaining about plant closings which result in job terminations but do not require either party to reach agreement on this, or any other subject.[9]

---

[8] The speaker, Representative Griswold, was a member of the House Committee on Education and Labor and one of the managers on the part of the House when the Bill reached conference, see H. Rep. No. 1371 on S. 1958, 74th Cong., 1st Sess., p. 2.

It is not necessary for our purposes to regard Representative Griswold as having focused his attention on the question whether plant closings (or partial closings) are a mandatory subject of bargaining. It is sufficient that the sponsors of the legislation did not consider that subject to be for any reason beyond the ambit of the collective bargaining which the Bill did require, and that it was the general understanding that the employers' protections against keeping open a plant which they wished to close (or partially close) was that the duty to bargain did not entail the duty to agree.

Shortly thereafter, Mr. Griswold suggested to another opponent that "if we have 12 years to work it out, as the gentleman's side did, we will certainly make a better success of it than his side has." [Laughter and applause.] (79 Cong. Rec. 9682.) There is a certain irony in the fact that when "the [other] gentleman's side" (the Republican party) was returned to legislative power exactly 12 years thereafter, it did amend the National Labor Relations Act in many respects; but what is particularly relevant here is, that the 1947 Congress did *not* change the policy of the Act in favor of free collective bargaining.

[9] When this point is properly appreciated it becomes clear that this case differs entirely from *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, on which the Chamber of Commerce bases its argument: If the Court had construed § 8(a)(3) as forbidding an

As we have noted, and as *Porter* held, the 1947 Act added certain language in § 8(d) in order to assure "freedom of contract" in the face of NLRB decisions which it was thought had departed from this Congressional policy. This change enhanced the policy of encouraging collective bargaining which Congress preserved in § 1. Maintenance of that policy is directly attributable to the views of Senator Taft, who explained his support for free collective bargaining in a speech which this Court twice cited as authoritative:

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on the free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the incenvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. * * * [2 Leg. Hist. 1007, quoted in *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 395, n.21; see also *Bus Employees v. Missouri*, 374 U.S. 74, 82, n.9.] [10]

In *Labor Board* v. *Insurance Agents*, 361 U.S. 477, the Court explained the nature of collective bargaining under the system established by Congress. While the entire portion of the Court's opinion marked *Third* (*id.* at 488-489)

---

employer from going out of business where the Board finds anti-union motivation in that action, it would have drawn from § 8(a)(3) a governmental command that he keep his plant open. The duty to bargain about plant closing, however, does not entail such a governmentally created duty because the government does not compel acceptance of the union's demands. *See* the colloquy quoted at pp. 20-21, *supra*.

[10] One of Senator Taft's main concerns, as he made clear in that same speech, was that the alternative to free collective bargaining was government regulation of wages and prices. (2 Leg. Hist. 1007, also quoted in *Bus Employees, supra*, 340 U.S. at 395-396, n. 21. Cf. *Newspaper Pub. Assn.* v. *Labor Board*, 345 U.S. 100, 108.)

is very much in point, we must, given the limitations of space, here confine ourselves to quoting the following:

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. [361 U.S. at 488-489.]

Consequently, as the Court observed in *Porter:*

> The Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. [397 U.S. at 109.]

Protection of the employees' rights to exercise their economic strength to further their interests in a labor dispute was the purpose of the Norris-LaGuardia Act (see *Telegraphers, supra,* 362 U.S. at 335-336) and was carried forward in the Wagner and Taft-Hartley Acts. An interpretation of § 8(d) which excludes from the subject of bargaining any aspect of the employer-employee relationship deprives the employees of the right to protect themselves by collective action against what they consider to be "arbitrary and unfair treatment." See *Jones & Laughlin, supra,* 301 U.S. at 33, and *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209. The position for which petitioner and the *amici* on its side contend would in fact deprive the employees of their right "to protect themselves" against the very loss of their jobs.

C. Petitioner and the *amici* supporting its position can point to nothing in the language, legislative history or policy of the NLRA to justify the contention that partial closing decisions which result in the loss of jobs should be excluded from the subjects of mandatory bargaining. Thus, they fall back on an ill-defined and self-serving concept of "management prerogative" to exclude such decisions from the system which Congress has established, and thereby to deprive employees of the right to avoid or modify such a decision through the mediating efforts of give-and-take negotiations, or through the use of whatever economic resources the employees can bring to bear. That line of argument is irreconcilable with the precedents and the Congressional decisions which we have already discussed in this brief. And even if the issue nevertheless remains fairly open to judicial consideration, experience confirms that free collective bargaining on this subject is both productive and necessary and confirms the judgment of Congress in "imposing legal duties upon employers to meet and bargain with the representatives of employees * * * to create a structure of industrial self-government * * *" (*East Bay Union of Machinists Local 1304* v. *NLRB*, 116 U.S. App. D.C. 198, 201, 322 F.2d 411, 414, Burger, J.) affirmed *sub. nom. Fibreboard, supra*, 379 U.S. 203, 211).

1) As to precedent, we again point out that the opinion of this Court in *Telegraphers, supra*, expressly and unqualifiedly disapproved the "management prerogative" theory which had been adopted by the Seventh Circuit in that case, in holding that the railroads there were not required to bargain about their decision to shut down railroad stations. See 362 U.S. at 339, quoted at p. 12 *supra*.[11]

Petitioner and the *amici* on its side apparently believe

[11] Although this Court was divided in *Telegraphers*, none of the dissenting opinions would have affirmed the Seventh Circuit on the management prerogative theory; rather, the thrust of those opinions was that this Court's decision was inconsistent with the Interstate Commerce Act, which reserved to the states the decision to permit the station closing in question.

that by careful inattention to the *Telegraphers* case they can escape its precedential force and the necessity to reconcile what they say with what was there held.

The discussion at pp. 13-23 establishes that petitioner's position is wholly inconsistent with the decisions which Congress made first in enacting and then in amending the NLRA. We shall not repeat that discussion at this point. Given those legislative decisions, it is clear that in seeking an exception to the duty to bargain those on petitioner's side are asking this Court "to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal,' " contrary to the separation of powers established by our Constitutional system. (See *TVA* v. *Hill,* 437 U.S. 153, 195.) We expect that the Court will find this invitation particularly unwelcome given the unhappy history of judicial interference in labor-management relations, and Congress' "clear disapproval of these free-wheeling judicial exercises" *Railroad Trainment* v. *Terminal Co.,* 394 U.S. 369, 382-383 (Harlan, J.)) [12]

---

[12] See also *id.* at 391-393. The Court there recognized that because it lacked judicially usable standards or access to administrative expertise "there is no really satisfactory judicial solution to the problem" of determining what forms of peaceful economic action are permissible under the Railway Labor Act, but concluded "that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." To be sure, under the NLRA, such administrative expertise is provided, and the Board has been charged in the first instance to determine the scope of mandatory bargaining. See *Ford Motor Co., supra,* 441 U.S. at 496. We have urged that the Board's authority in this respect must be exercised in accord with the other legislative decisions made in 1935 and 1947. See p. 19, *supra.* In any event, petitioner can derive no support from the commitment of the present issue to the Board, given its decision in this case, which is consistent with the Board's overall position that there is no management prerogative to refuse to bargain about partial closings which result in loss

2) Petitioners place primary reliance on Justice Stewart's concurring opinion in the *Fibreboard* case (379 U.S. at 217 *et seq.*), and particularly on the statement therein that nothing in the Court's holding in that case "should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of intrepreneurial control." (*Id.* at 223.) It is simply assumed, rather than demonstrated, on petitioner's side that the issue to be bargained over here does "lie at the core of entrepreneurial control" within the meaning of that opinion. This assumption seems to us to be unwarranted, first because the termination decision in this case does not fit into any of the "fundamental" management decisions which Justice Stewart there described, and second, because petitioners have shown no distinction between the facts in this case and those of *Fibreboard* which would justify a different result than the concurring Justices reached there. However, if we are wrong in this, and the Board's decision herein is incompatible with the theory of the *Fibreboard* concurrence, we respectfully urge that that theory not be accepted by a majority of the Court. Our principal reason for this submission is that to exclude matters which directly affect employees' job tenure, like the termination decision at issue in this case, from mandatory bargaining would be wholly inconsistent with Congressional policy, and the decisions of this Court which have

---

of jobs. Rather, petitioner and others in similar positions have come to the courts in an effort to gain acceptance of their plea to be relieved of that statutory duty. To the extent that some courts have reversed Board bargaining orders in this context, we submit that they have misread the statute, and exceeded their proper functions. That petitioner is able to point out some inconsistencies among Board decisions, is largely traceable, we think, to the Board's effort to accommodate some of these judicial decisions, and, in some instances, the failure to draw the distinction, elaborated in Part I of this brief, between bargaining over the terms of a new contract and bargaining when a contract is in effect, and it may well be that the Board itself has, on occasion, failed to give full effect to the Congressional judgment in favor of collective bargaining.

articulated and effectuated that policy. A secondary consideration is the inherent ambiguity of the concept. Differences as to its meaning will inevitably reflect the different perspectives of labor and management.[13] As we have shown, Congress has not authorized either the courts or the Board to resolve such differences on the basis of their own judgment as to what are and are not "fundamental" management decisions.

D. Under our understanding of the statute it is irrelevant, when parties negotiate over the terms of a new agreement, whether there is a likelihood that bargaining between them will result in avoidance of the partial closing on some basis, such as concessions by the union. To the extent

---

[13] When Charles E. Wilson was President of General Motors he said:

"Under these conditions, the freedom of management to function properly without interference in making its every-day decisions will be gradually restricted. The Union leaders—particularly where they have industry-wide power—will have the deciding vote in all managerial decisions, or at least, will exercise a veto power that will stop progress.

"Competition will be stifled and progress in the improvement of industrial processes which reduce the cost and price of the goods produced by industry will be halted.

"Only by defining and restricting collective bargaining to its proper sphere can we hope to save what we have come to know as our American system and keep it from evolving into an alien form, imported from East of the Rhine. Until this is done, the border area of collective bargaining will be a constant battleground between employers and unions, as the unions continuously attempt to press the boundary farther and farther into the area of managerial functions." [Quoted in Neil W. Chamberlain, *The Labor Sector*, p. 342 (1965) ed.)] The specific target of Wilson's objection was a 1947 demand by the UAW that General Motors bargain over pensions. Pensions were, of course, held to be a bargainable subject in *Inland Steel*, 77 NLRB 1, enf'd, 170 F.2d 247 (C.A. 7), *cert. denied*, 336 U.S. 960, and have since been successfully bargained about on innumerable occasions without adverse impact on industrial progress.

that the Board and the court below in this case, and the Third Circuit in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (C.A. 3) have declared that there is a presumption in favor of collective bargaining, but that it may be overcome if the employer shows that bargaining will be fruitless, the Board and those courts are in error; but they err for a reason entirely opposite to that for which petitioner contends, and which has been accepted by some other lower courts. There is a presumption in favor of collective bargaining in these instances, but that presumption is irrebutable, at least, where the parties' relationship is not governed by a contract (see Part 1), because it has been established by Congress as a matter of policy in § 1 of the Act, and has been implemented in positive law by §§ 8(a)(5), 8(b)(3), and 8(d) (which establish and define the duty to bargain) and by §§ 7 and 13 (which give to workers the right to engage in concerted activity, and protect their right to strike). Therefore, the finding that agreement could result, such as was made in *Fibreboard*, 379 U.S. at 213-214, while it supports the conclusion that a particular subject is susceptible to bargaining, is not necessary to reach the result here, contrary to the reading of *Fibreboard* at Pet. Br. 16-17. (This, of course, does not warrant reversal of the Board's decision, see, *e.g.*, *Massachusetts Trustees* v. *U.S.*, 377 U.S. 235 at 246). However, since the Court may determine otherwise, we show briefly from the experience of the AFL-CIO's affiliates, and of the UAW, that to bargain over a decision to close a plant or other facility where the effect would be the loss of jobs, is often beneficial.

The UAW's experience has been that negotiations over potential plant closing have been fruitful; such bargaining has often avoided closings, or at the very least promoted

[14] This is most true when an employer decides to close for production-related reasons. In such a situation, it is quite possible that a union would offer to change wage rates, work rules, or take other steps which would result in a reduction of production costs. Even when non-production related economic difficulties result in plans to close a particular facility, bargaining often proves productive.

mutual understanding which has eased the economic and psychological impact on the workers, with beneficial effects for employers as well.

The UAW's experience (see Motion, p. ii) is not at all unique, and has in fact been shared by affiliates of the AFL-CIO. In its most recent agreements with Firestone, Uniroyal, Goodyear and Goodrich, the United Rubber Workers obtained from each company a promise to provide 6 months notice of any intended plant closing, in order to afford both labor and management the opportunity to explore any possible means of averting the closure.[15] Such negotiations have occurred. For example, the URW agreed to concessions which included a 13 percent reduction in its contract with Uniroyal, saving the company $54 million in an attempt to avert plant closings and job loss. Similarly, Rubber Workers at Firestone's Noblesville, Indiana plant voted 2 to 1 early this year to save jobs by taking a $1.40 per hour wage cut and giving up cost of living adjustments until 1984.[16]

The Steelworkers[17] have reluctantly negotiated concessions with economically troubled employers, in order to

---

Economic adjustments by a union can still help to keep a plant open, and return it to profitability, since economic costs are to a great extent fungible. Reductions in production costs due to wage or other concessions may make up for burdensome costs or business weaknesses in other areas. To save jobs, unions may be willing to engage in such wage-employment tradeoffs. See, Peter Henle, *Reverse Collective Bargaining? A Look at Some Union Concession Situations,* Industrial & Labor Relations Review, Vol. 26, No. 3, April 1978.

[15] See, BNA Daily Labor Report, September 26, 1980, p. F-2. Similarly, the current labor agreements between the United Steelworkers and the major steel manufacturers set forth advance notice and discussion requirements pertaining to plant closings.

[16] See, *Unions Giving Back Contract Gains to Save Jobs in Troubled Industries,* Washington Post, August 4, 1980; *Now, It's Pay Cuts Instead of Raises,* U.S. News & World Report, February 9, 1981; *Firestone Division is Planning to Close Plant in Indiana,* Wall Street Journal, October 30, 1980.

[17] See, *Steelworkers Agree to Delay Pay Raises,* Associated

forestall plant closings and the resultant loss of jobs. UAW has had similar experiences with small employers. In many of those cases it was the employers, rather than the union, which requested negotiations to avoid closings. And the union, acting in responsible fashion, has sat down with those particular employers, carefully analyzed their claims, and made the appropriate recommendations to its members.

This experience demonstrates that labor and management can and do engage in productive negotiations over potential decisions to close plants and find ways to avert those closings, in a manner beneficial to the interests of each. Frequently, ways to solve problems leading to closings are reached, but even if they are not, mutual understanding and trust are engendered. In other words, free collective bargaining in the plant closing context works, just as Congress judged it would. Or, at very least, the chances that it will work "are good enough" to make bargaining worthwhile. See *Fibreboard, supra* 379 U.S. at 214.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

J. Albert Woll
815 15th Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 16th Street, N.W.
Washington, D.C. 20006
(Counsel of Record)
(202) 637-5390

George Kaufmann
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for AFL-CIO

John A. Fillion
Leonard Page
Michael Nicholson
8000 E. Jefferson Ave.
Detroit, Michigan 48214

Attorneys for International Union, UAW

Press, September 9, 1980; *Unions Making Contract Concessions,* Associated Press, September 10, 1980; *Now It's Pay Cuts Instead of Raises,* U.S. News & World Report, February 9, 1981, p. 74.

No. 80-544

IN THE

Supreme Court of the United States

October Term, 1980

FIRST NATIONAL MAINTENANCE CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
ROBERT J. FENLON*
DAVID R. HOLS
FELHABER, LARSON,
FENLON & VOGT, P.A.
West 1080 First
National Bank Building
St. Paul, Minnesota 55101
(612) 222-6321
*Counsel of Record

February, 1981

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

The issue in this case is whether an employer violated its bargaining obligation under the National Labor Relations Act when, without prior bargaining, it made a decision to close a part of its operations resulting in the termination of certain employees who were then represented by a labor organization.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATUTE PRESENTED	2
STATEMENT OF THE CASE	2
A. FACTS INVOLVED	2
B. THE PROCEEDINGS BELOW	3
SUMMARY OF ASPA ARGUMENTS	4
ARGUMENT	4
I. THE VARIOUS APPROACHES TO PARTIAL CLOSURES	4
A. HISTORICAL DEVELOPMENT	4
B. THE REBUTTABLE PRESUMPTION	6
II. IS A PARTIAL CLOSURE "TERMS AND OTHER CONDITIONS OF EMPLOYMENT" WITHIN THE FIBREBOARD DECISION?	10
A. THE DIFFERENCE BETWEEN PARTIAL CLOSURE AND SUBCONTRACTING	10
B. THE CONCEPT OF A UNILATERAL CHANGE	12
C. THE RELEVANCE OF CONCURRENT CONTRACT NEGOTIATIONS TO PARTIAL CLOSURE DECISIONS	14
CONCLUSION	15

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Page

Cases:

Brockway Motor Trucks v. NLRB, 582 F. 2d 720, 99 LRRM 2013 (3rd Cir., 1978) 6, 7, 8, 9, 11, 14

Darlington Manufacturing Co. v. NLRB, 397 F. 2d 760, 68 LRRM 2356 (4th Cir., 1968) 9

Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 57 LRRM 2609 (1964) 4, 5, 7, 10, 11, 12, 14

NLRB v. Adams Dairy, Inc., 350 F. 2d 108, 60 LRRM 2084 (8th Cir., 1965) cert. denied 382 U.S. 1011, 61 LRRM 2192 (1966) 6, 8, 10, 14

NLRB v. American Manufacturing Co., 351 F. 2d 74, 60 LRRM 2122 (5th Cir., 1965) 6

NLRB v. Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958) 15

NLRB v. First National Maintenance Corp., 242 NLRB No. 72 ..... 2, 3

NLRB v. Insurance Agents Union, 361 U.S. 477, 45 LRRM 2705 13

NLRB v. Katz, 289 F. 2d 700 13

NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) 13

NLRB v. Royal Plating and Polishing Co., 350 F. 2d 191, 60 LRRM 2033 (3rd Cir., 1965) . 6, 8, 9

NLRB v. Thompson Transport Co., 406 F. 2d 698, 70 LRRM 2418 (10th Cir., 1969) 6

Page

NLRB v. Transmarine Navigation Corp., 380 F. 2d 933, 65 LRRM 2861 (9th Cir., 1967) 6

NLRB v. Winn-Dixie Stores, Inc., 361 F. 2d 512, 62 LRRM 2218 (5th Cir.) cert. denied 385 U.S. 935 (1966) 6

Ozark Trailers, Inc., 161 NLRB 561, 63 LRRM 1264 (1966) 5, 10

Statute:

National Labor Relations Act, Section 8(d), 29 U.S.C. 158(d) 2, 11, 12, 13

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is respectfully submitted by the American Society for Personnel Administration (hereinafter referred to as ASPA),[1] which is an association composed of professional personnel administrators and industrial relations practitioners engaged in business, industry, government and education. Firms represented by the membership of ASPA have an aggregate employment of in excess of 27 million employees.

[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

STATUTE PRESENTED

Section 8(a) of the National Labor Relations Act (61 Stat. 141, as amended, 73 Stat. 542-543; 29 U.S.C. 158(a)) provides in relevant part:

> "(a) It shall be an unfair labor practice for an employer
>
> * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."

STATEMENT OF THE CASE

A. Facts Involved

First National Maintenance Corp., a commercial cleaning and maintenance firm, was organized by a labor organization which was certified on May 11, 1977. At a time when the labor organization had requested collective bargaining but no collective bargaining had taken place, First National Maintenance Corp. made a decision to discontinue an unprofitable portion of its operation. This decision was made without prior negotiations with the labor organization which represented its employees. Approximately thirty-five (35) employees were terminated as a result of the decision. It is established, for purposes of this proceeding, that the motivation for this decision was purely economic resulting from financial losses on the discontinued operation. Also, it is established that First National Maintenance Corp.'s losses were not the result of labor costs, but were the result of an unsatisfactory management fee arrangement.

B. The Proceedings Below

This matter was initially decided by the National Labor Relations Board pursuant to a complaint of its General Counsel alleging that First National Maintenance Corp. violated its bargaining obligation by discontinuing a portion of its operations without first negotiating with its Union. The National Labor Relations Board found that First National Maintenance Corp. violated its bargaining obligation by acting unilaterally, without first negotiating with its Union, regarding the decision to terminate an operation. (242 NLRB No. 72) The Board adopted the rationale that a partial closure of operations which has an adverse impact upon employee job opportunities falls within the statutory definition of "wages, hours, and other terms and conditions of employment". Therefore the Board ruled that where such employees have a representative for purposes of collective bargaining, the bargaining obligation includes the obligation to notify and negotiate with the representative the decision to partially close.

The United States Court of Appeals for the Second Circuit enforced the Board's Order, but in doing so, rejected the Board's rationale that any partial closure adversely affecting employee job opportunities raises an obligation to bargain concerning the decision.[2] The Court determined that a partial closing raises a presumption that a duty to bargain exists which could be rebutted by a determination of the "relative merits" of the arguments bearing on whether to impose a duty to bargain in a particular case.[3] Regarding the relative merits of the case before it, the Court ruled that the loss of money

[2] 627 F. 2d at 596.
[3] 627 F. 2d at 601.

by First National Maintenance Corp. alone was insufficient to rebut the presumptive bargaining obligation and, accordingly, the Board's Order was enforced.

SUMMARY OF ASPA ARGUMENTS

The ASPA contends that a partial closure of operations by an employer free of anti-union motivation should raise no bargaining obligation as to the decision. The ASPA contends that there is no statutory basis for such a requirement either on the per se approach adopted by the Board or on the presumptive basis enunciated by the Court below and other circuit courts. The ASPA contends that, in reality, bargaining regarding management decisions concerning entrepreneurial matters is unworkable and illusory.

ARGUMENT

I. THE VARIOUS APPROACHES TO PARTIAL CLOSURES

A. Historical Development

The legal underpinning for the authorities that hold that in any circumstances an employer must bargain about a decision to partially close an operation stems from this Court's decision in *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 57 LRRM 2609 (1964). Although the Court below commented that the *Fibreboard* decision did not "fully determine the issue"[4] and, furthermore, provided "lack of clear direction",[5] nevertheless the Court found it applicable. Thus, the Court stated:

[4] 627 F. 2d at 599.
[5] 627 F. 2d at 599.

"Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction." 627 F. 2d at 601.

The National Labor Relations Board has historically treated partial closures as virtually indistinguishable from the subcontracting dealt with in *Fibreboard*. Explaining its position with respect to partial closures, the Board made clear in *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264 (1966), that it considered the *Fibreboard* decision to provide the full basis for its holding that partial closure decisions were bargainable.[6] However, in addition to the application of the pure legal precedent of *Fibreboard*, the Board appears to go further and employ a notion of the "greater good" in its partial closure rationale. For example, the Board clearly considers such bargaining to be mutually beneficial. The Board stated:

". . . [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business." 161 NLRB at 568.

---

[6] "So here a termination of employment was the necessary result of Respondent's decision to close the Ozark plant. Thus, here, just as in *Fibreboard*, the Respondents have failed to bargain concerning the 'terms or conditions of employment.'" 161 NLRB at 565.

Further, the Board stated:

> "In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management." 161 NRLB at 567.

One Circuit Court apparently accepts the position of the Board that partial closure decisions adversely affecting employment are per se bargainable. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F. 2d 512, 62 LRRM 2218 (5th Cir.), cert. denied, 385 U.S. 935 (1966); *NLRB v. American Manufacturing Co.*, 351 F. 2d 74, 60 LRRM 2122 (5th Cir., 1965). Other Circuit Courts have denied the Board enforcement of its orders for a variety of reasons which will be discussed more fully herein.[7]

B. The Rebuttable Presumption

The Second Circuit in the instant case and the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F. 2d 720, 99 LRRM 2013 (3rd Cir., 1978) have held that a decision to partially close operations raises a rebuttable presumption that bargaining is required. The Court below considered partial closures to be "an area whose parameters are not clearly defined by the statute or by Supreme Court precedent."[8] The Court, however, did read *Fibreboard* as indicating the inappropriateness of finding that a partial closure decision was

---

[7] *NLRB v. Adams Dairy, Inc.*, 350 F. 2d 108, 60 LRRM 2084 (8th Cir., 1965) cert. denied, 382 U.S. 1011, 61 LRRM 2192 (1966); *NLRB v. Thompson Transport Co.*, 406 F. 2d 698, 70 LRRM 2418 (10th Cir., 1969); *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933, 65 LRRM 2861 (9th Cir., 1967); *NLRB v. Royal Plating and Polishing Co.*, 350 F. 2d 191, 60 LRRM 2033 (3rd Cir., 1965).

[8] 627 F. 2d at 601.

per se not bargainable. The Court so concluded based on the following dicta from *Fibreboard:*

> "Although it is not possible to say whether a satisfactory solution could be reached, National Labor Policy is founded upon the Congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." 379 U.S. at 214.

The *Brockway* Court, likewise, read *Fibreboard* as not supporting the per se approach taken by the Board but, rather, considered *Fibreboard* to counsel "a practical balancing approach to the problem of articulating the scope of the employer's duty to bargain under the NLRB."[9] Both Courts, therefore, read *Fibreboard* as authority for a middle ground where, under some circumstances the decision would be bargainable, and under others, it would not. In *Brockway*, the Court adopted a test based on the probability of the success of bargaining with respect to the decision. The Court noted the concern of employees over the prospect of losing their jobs and went on to state:

> "In particular, to the extent that *Brockway's* decision to shut down one of its facilities is the result of high costs of production, it is possible that the Union might undertake to reduce labor expenses and, thereby, alter the calculation that led to the employer's determination in the first place. Indeed labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and, thus, to prevent the closing of a facility and the loss of jobs." 582 F. 2d at 735-6.

---

[9] 582 F. 2d at 732.

The employer's assertion of "economic considerations" was held to be insufficient rebuttal. However, because it appeared at oral argument that the employer may have gone totally out of business, the Court denied enforcement without prejudice to the NLRB to commence additional proceedings.

In the present case, the Court below agreed with the *Brockway* Court that a partial closure raised a presumption that the duty to bargain existed. The Court read the *Brockway* decision as creating a balancing of interests approach in determining whether the presumption has been rebutted. The Court rejected the *Brockway* approach and adopted a "relative merits of the arguments" test.[10] This included whether the bargaining might be futile, whether an emergency existed, an examination of industry custom and practice, and possible danger to the vitality of the entire business.

Earlier Circuit Court decisions indicate that a similar type of balancing approach has been applied without necessarily articulating the rebuttable presumption concept. Thus, *Royal Plating and Polishing*,[11] which the *Brockway* Court did not criticize, apparently was a case in which bargaining would have been futile and in which the employer had a relatively urgent need for action. In *Adams Dairy*,[12] it was noted that prior bargaining with respect to subcontracting had not born fruit and, further, that the employer's actions involved substantial capital decisions.

It is respectfully submitted that attempted resolution of partial closure cases according to the reason asserted for the closure is simply not practicable or workable. Reasons given

---

[10] 627 F. 2d at 601.
[11] Note 7, *supra*.
[12] Note 7, *supra*.

for partial closures have ranged from a bare assertion of "economic considerations"[13] simple, unprofitability of the operation,[14] and to delicate negotiations with the Housing Authority.[15] We may add to the potential reasons for a partial closure a simple wish on the part of an entrepreneur to be done with a particular line of business and invest his money elsewhere. (In all cases, of course, we are assuming the absence of a discriminatory motive for which, if it does exist, other adequate remedies are available.)[16] When it comes to balancing of interests, it should be remembered that in every case the interests on the employees' side will be the same. That interest will be the interest of the employees in continuing to hold their jobs. By definition, the interest on the employer's side will be economic. The decisions of the Board and the Circuit Court's finding a bargaining obligation in this setting obviously assume that bargaining will be a salutary effort for the employer in that it might alleviate the perceived economic problem in the form of lower wages, productivity concessions and the like. This approach ignores the realities that where such problems exist with such potential solutions, together with the will of the parties to solve them, the problems get solved of their own without the intervention of the Board or the Courts. Conversely, where neither the solution nor the will to solve exists, no amount of bargaining will cure the problem. Therefore, to the extent that the Board and the Courts feel that they are shaping the law toward the constructive solution of problems, they are in error. Moreover, whether their approach be salutary or not, it should not be imposed if not required by law.

---

[13] *Brockway Motor Trucks v. NLRB, supra.*

[14] As in the instant case.

[15] *NLRB v. Royal Plating and Polishing Co., supra.*

[16] E.g., *Darlington Manufacturing Co. v. NLRB,* 397 F. 2d 760, 68 LRRM 2356 (4th Cir., 1968).

II. IS A PARTIAL CLOSURE "TERMS AND OTHER CONDITIONS OF EMPLOYMENT" WITHIN THE *FIBREBOARD* DECISION?

A. The Difference Between Partial Closure and Subcontracting

Perhaps the reason the partial closure cases have caused so much conceptual difficulty is that in some instances they are similar to subcontracting. Thus, in *Adams Dairy*, the employer continued in business after the change in operations utilizing independent contractors in place of its own employees. In *Ozark Trailers*, the employer continued in business after the partial closure obtaining truck bodies from an outside source. These similarities are, no doubt, what led to the application of *Fibreboard* to partial closings. However, it is submitted that the application is in disregard of clear directives of this Court in the *Fibreboard* decision. The distinction between the subcontracting involved in *Fibreboard* and partial closures can be found in the text of the *Fibreboard* decision itself. Thus, the Court stated:

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213.

Further, the Court stated:

> "We are, thus, not expanding the scope of mandatory bargaining to hold as we do now that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." 379 U.S. at 215.

The Court of Appeals in the *Brockway* case in finding that partial closure related to terms and other conditions of employment stated as follows:

> "Just as subcontracting is likely to lead to the termination of employment, so too will the closing down of an employer's plant—and, thus, the latter act 'might appropriately be called a condition of employment'." 582 F. 2d at 735.

This holding relies on the holding in *Fibreboard* that the subcontracting resulted in terminations of employment and, therefore, involved "terms and other conditions of employment." It is respectfully submitted that the reasoning of the *Brockway* Court is erroneous. In *Fibreboard*, the Court was confronted with what literally amounted to a direct termination of employment. Thus, an employer without otherwise changing its operations substituted one group of employees for another. Nothing more was involved by way of capital investment or entrepreneurial decision. The termination involved before the *Brockway* Court was a step removed. The

decision involved was not who would do certain work, but rather whether certain work would be done at all. That there was a *resulting* termination does not make the decision bargainable. Stated another way, while a decision to terminate may be bargainable, a decision with respect to capital investment which results in termination should not be bargainable. Many entrepreneurial decisions affect employment opportunities. A decision to acquire new equipment or modernize a plant may result in increased and enhanced employment opportunities. Yet, this type of decision is clearly not bargainable. A fair reading of the *Fibreboard* decision shows nothing that indicated this court intended to make entrepreneurial decisions bargainable, notwithstanding that they may have a *resulting impact* on terms and conditions of employment. Indeed, the concurring opinion in *Fibreboard* specifically disclaimed any intention that "every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain." 379 U.S. at 218. Plainly, then, there is ample room for distinction between the subcontracting in *Fibreboard* and the partial closure in the instant case.

B. The Concept of a Unilateral Change

Section 8(b) of the National Labor Relations Act obligates employers and labor organizations to ". . . meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."[17] The Board's theory that a partial closure without prior bargaining as to the decision is a violation is in effect a contention that the employer has acted unilaterally with respect to bargainable matters. This concept of a violation of the law in unilateral

[17] National Labor Relations Act Section 8(d), 29 U.S.C. §158(d).

action was first espoused by this Court in the case of *NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962). In that case, an employer, acting without improper motive, made unilateral changes in wages and benefits during the course of negotiations with a union. The Circuit Court of Appeals for the second Circuit had denied enforcement of the Board's cease and desist order holding that the statutory duty to bargain cannot be held to be violated when bargaining is in fact being carried on without a finding of the employer's subjective bad faith in negotiations. *NLRB v. Katz*, 289 F. 2d 700. The Circuit Court rested its decision upon the decision of this Court in *NLRB v. Insurance Agents Union*, 361 U.S. 477, 45 LRRM 2705. This Court, in reversing the Circuit, stated as follows:

> "A refusal to negotiate in fact as to *any subject which is within Section 8(d)* and about which the Union seeks to negotiate, violates Section 8(a)(5) though the Employer has every desire to reach agreement with the Union upon an overall collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." (Emphasis supplied. 369 U.S. at 743.)

Thus, it can be seen that not all unilateral action is forbidden, but only unilateral action with respect to subjects within Section 8(d). As noted above, those authorities finding a bargaining obligation with respect to partial closures do so on the theory that a decision regarding termination is involved. If that were the decision involved, it would fall within Section

8(d) and, therefore, would be an improper subject for unilateral action. However, the decision for which bargaining is sought is not a decision to terminate as such, but a decision with respect to the nature and form of a business which may result in a termination. As noted above, *Fibreboard* literally involved a termination decision inasmuch as the sole question was who was going to do the work that was otherwise going to be done. *Fibreboard* is stretched too far to make this reasoning applicable to a decision to cease a portion of an operation.

C. The Relevance of Concurrent Contract Negotiations to Partial Closure Decisions

Two Circuit Courts have attached significance to the question of whether contract negotiations were concurrently in progress in determining whether a partial closure decision was a mandatory subject of bargaining. In *Adams Dairy* the Court regarded the fact that contract negotiations were not concurrent as an important distinction from *Fibreboard* in which they were and, accordingly, "there was little or no excuse for not negotiating the disputed issue . . ."[18] Conversely, the Court, in *Brockway Motor Trucks*, attached significance to the fact that negotiations were concurrently in progress and stated that this "dramatically distinguishes" the *Adams Dairy* case.[19] While it is true that negotiations were concurrently in progress at the time of the subcontracting in *Fibreboard*, there is nothing in this Court's decision to indicate any significance was attached to that fact. It may be that the Third and the Eighth Circuits would regard an employer's conduct in failing to mention the proposed change at a time

[18] 350 F. 2d at 113.
[19] 582 F. 2d at 728.

when it might logically be raised as being reprehensible or perhaps clandestine. In any event, ASPA contends that the point is immaterial. We here treat whether a particular subject, i.e., a partial closing decision, is a mandatory or non-mandatory subject of bargaining. If it is non-mandatory, it does not change its status simply because negotiations are in progress. This Court has held that a party may refuse to negotiate concerning a non-mandatory subject even though negotiations may be currently in progress. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 42 LRRM 2034 (1958).

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully submits that the decision of the U.S. Court of Appeals for the Second Circuit should be reversed and remanded with directions to deny enforcement to the Board's Order.

Respectfully submitted,

ROBERT J. FENLON*
DAVID R. HOLS
FELHABER, LARSON,
FENLON & VOGT, P.A.
West 1080 First National
Bank Building
St. Paul, Minnesota 55101
(612) 222-6321
*Of Counsel to American
Society for Personnel
Administration*

*Counsel of Record

February, 1981

No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

MARVIN E. FRANKEL
SAUL G. KRAMER

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 593-9000

Attorneys for the Chamber of Commerce of the United States, *Amicus Curiae*

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3186

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Interest of the *Amicus Curiae*	1
Summary of Argument	4
Argument	6
I. PRIOR DECISIONS OF THIS COURT, AS SOUNDLY UNDERSTOOD AND FOLLOWED IN A MAJORITY OF THE CIRCUITS, SUPPORT AN EMPLOYER'S FREEDOM TO CLOSE A DISCRETE PLANT OR FACILITY WITHOUT FIRST BARGAINING WITH THE UNION ABOUT THE DECISION TO DO SO	6
A. *Fibreboard* Dealt Narrowly with a Clearly Distinguishable Case of Substituting Employees Continuing the Same Work by Contracting Out Rather than Closing or Terminating Part of the Enterprise	7
B. The Premises and Principles of This Court's Decision in *Textile Workers Union* v. *Darlington Manufacturing Co.* Show That a Partial Closing, Not Motivated by Antiunion Animus, Cannot Constitute an Unfair Labor Practice	8
II. THE BOARD'S INCONSISTENT POSITIONS, AND THE DIVERGENT VIEWS OF THE SECOND AND THIRD CIRCUITS, ARE UNWORKABLE AND UNPREDICTABLE FETTERS ON MANAGERIAL DISCRETION	11
A. The Board's Decisions Reach Differing Results On Distinctions That Should Make No Difference	12

PAGE

B. The Divergent "Presumptions" of the Second and Third Circuits Tend to Aggravate Rather Than Repair the Discordant and Unpredictable Course of Board Decisions 17

Conclusion 20

TABLE OF AUTHORITIES

Cases PAGE

Allegheny General Hospital v. *NLRB*, 608 F.2d 965 (3d Cir. 1979) 18

Brockway Motor Trucks, Division of Mack Trucks, Inc., 251 N.L.R.B. No. 23 (1980) ..... *passim*

Brockway Motor Trucks v. *NLRB*, 582 F.2d 720 (3d Cir. 1978) ..... *passim*

Brooks-Scanlon, Inc., 246 N.L.R.B. No. 76 (1979) 12

Consolidated Edison Co. v. *Public Service Commission*, ____ U.S. ____, 100 S. Ct. 2325 (1980)..... 2

Darlington Manufacturing Co. v. *NLRB*, 325 F.2d 682 (4th Cir. 1963) 9

Electrical Products Division of Midland-Ross Corp., 239 N.L.R.B. 323 (1978)..... 17

Electrical Products Division of Midland-Ross Corp. v. *NLRB*, 617 F.2d 977 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3249 (No. 80-67, Oct. 6, 1980) 17

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) ..... *passim*

General Motors Corp., 191 N.L.R.B. 951 (1971)..... 3, 13, 14, 15, 16

Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, ____ U.S. ____, 100 S. Ct. 2844 (1980) 2

International Union, UAW v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972) 3, 13

Morrison Cafeterias Consolidated, Inc. v. *NLRB*, 431 F.2d 254 (8th Cir. 1970) 11

PAGE

National Car Rental System, Inc., 252 N.L.R.B. No. 27 (1980) 16

NLRB v. *Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965)..... 9

NLRB v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965) 11

NLRB v. *International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980) 9

NLRB v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).....11, 12

NLRB v. *Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).....11, 12

NLRB v. *Edward M. Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615, *reported without published opinion*, 541 F.2d 277 (4th Cir. 1976) 11

NLRB v. *Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969) 11

New York Telephone Co. v. *New York Department of Labor*, 440 U.S. 519 (1979) 2

Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) ..... *passim*

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 5, 17

Stanley Oil Co., 213 N.L.R.B. 219 (1974) 16

Summit Tooling Co., 195 N.L.R.B. 479 (1972), *enforced*, 71 Lab. Cas. ¶ 13,613 (7th Cir. 1973) 9, 15

Textile Workers Union v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965)..... *passim*

John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964) 9

PAGE

Statutes

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. § 158(a)(1) 7

Section 8(a)(3), 29 U.S.C. § 158(a)(3)..... 4, 7, 8, 10

Section 8(a)(5), 29 U.S.C. § 158(a)(5) ..... *passim*

Miscellaneous

R. GORMAN, LABOR LAW (1976) 14, 16

Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950) 9

Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing is a Mandatory Subject of Bargaining*— Brockway Motor Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978), 47 GEO. WASH. L. REV. 679 (1979). . . 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the Nation; it has a direct membership of over 97,000 corporations, partnerships, proprietorships, and individuals, as well as over 4000 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents the interests of its members before the United States Congress, the Executive Branch, the federal regulatory agencies, and, increasingly, the courts.

Its appearances in litigation matters have included participation as *amicus curiae* in numerous cases before this Court.[1]

The Chamber undertakes to represent the concerns of enlightened business leadership, and thereby to promote the wider interests served by such leadership. Problems like the one presented in this case are of special interest in a time like the present, a time of transition and intense self-scrutiny by all Americans concerned with preserving the benefits of a free, competitive, expanding economy. Taking the position that the decision below disserves these shared goals, the Chamber submits also that the rule of this decision is not consonant with the terms and purposes of the National Labor Relations Act.

Decisions to withdraw or transfer resources from one facility or line of endeavor to another are uniquely the central burdens and prerogatives of management. They are determinations that call for speed, flexibility, often for secrecy. They are matters on which the collective bargaining process is unlikely to be useful, but likely to be obstructive or destructive. As the Labor Board itself has said, in a setting not materially distinguishable in our view from the one presented here (*see* pp.13-16, *infra*):

> [D]ecisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employement [*sic*], or other conditions of employment." Such managerial decisions oftimes require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations

---

1 *E.g.*, *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, _____ U.S. _____, 100 S. Ct. 2844 (1980); *Consolidated Edison Co.* v. *Public Serv. Comm.*, _____ U.S. _____, 100 S. Ct. 2326 (1980); *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979) *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

> are likely to be unfamiliar to the employees and their representatives. [*General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), *petition for review denied sub nom. International Union, UAW* v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972).]

If the National Labor Relations Act required bargaining procedures destructive of sound managerial leadership without corresponding benefits to labor or some wider public, the remedy would presumably lie with Congress. But it is the position of this *amicus* that the rule enforced by the majority below is not soundly to be gleaned from the terms of § 8(a)(5) or the good sense of labor-management policy with which the interpretation of this statute must be approached.

The thought is more broadly expressed in words we quote from Justice Stewart's concurrence in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 225-26 (1964):

> I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. *But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.* [Emphasis added.]

SUMMARY OF ARGUMENT

I. Prior decisions of this Court, if not squarely controlling, lend strong support to petitioner's position. Narrowly confined to a case of subcontracting, where employees represented by the complaining union were displaced by other employees doing the same work in the same place, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), tends in its implications to preserve a partial closing for independent managerial discretion. *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), is more powerfully supportive of petitioner. There, the Court ruled that an employer closing one of its plants, even when acting from antiunion animus, could not be held guilty of an unfair labor practice under § 8(a)(3) of the Act, and required to reinstate discharged employees with back pay, unless the closing was accomplished with a motive and purpose to chill unionism in remaining plants. It should follow *a fortiori* that an employer, like petitioner here, acting only for legitimate business reasons and without antiunion motivation, is not subject to an order under § 8(a)(5) reinstating employees and giving them back pay because the partial closing was not preceded (any more or less than the closing in *Darlington*) by bargaining with the union.

The Board, drawing the lines more aptly then, held in *Darlington* that § 8(a)(5), as well as § 8(a)(3), had been violated in that case because there had been antiunion animus. But it did not attempt the more extreme position it presents now. This later position is not consonant with the National Labor Relations Act as construed by this Court in light of controlling policies dividing the sphere of independent managerial judgment from the broad area in which collective bargaining is mandatory.

II. The Board's extended position is self-contradictory and fails to supply rational guidance for those regulated. The Board distinguishes partial closings, where it holds bargaining compulsory, from partial *sales* of a business, for which it does

not require bargaining. Pursuing this distinction, it has held that an employer violated § 8(a)(5) when it closed a facility without bargaining after trying in vain, in the face of steady losses, to sell the facility. The distinction reflects no rational difference in law or policy; it reflects rather the Board's failure to recognize with clarity that both types of management decision involve substantially identical forms of managerial judgment that are not suitably subject to mandatory bargaining.

The Courts of Appeals, including the court below, have uniformly declined to uphold the Board's position. The court below enforced the Board's order on a rationale of its own, differing from the Board's. The Third Circuit had earlier followed a comparable course, but on a still different theory. These recent determinations, departing from a majority of the Circuits that have considered the problem, are questionable under the principle of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that an administrative decision should stand or fall upon the agency's stated grounds, not be upheld on different grounds evolved by the court.

Apart from that objection, the contrariety of views among the Board's own decisions, and as between the Board and the two Circuits tending to accept its decisions, is itself reflective of a misconceived body of doctrine. The fundamental defect is the failure to follow the lines of law and policy demonstrating that partial shutdowns or terminations of a business are not appropriate subjects for compulsory bargaining, but are properly within the domain lying "at the core of entrepreneurial control." *Fibreboard*, *supra*, at 223 (concurring opinion of Justice Stewart, joined by Justices Douglas and Harlan).

ARGUMENT

I.

PRIOR DECISIONS OF THIS COURT, AS SOUNDLY UNDERSTOOD AND FOLLOWED IN A MAJORITY OF THE CIRCUITS, SUPPORT AN EMPLOYER'S FREEDOM TO CLOSE A DISCRETE PLANT OR FACILITY WITHOUT FIRST BARGAINING WITH THE UNION ABOUT THE DECISION TO DO SO

While the exact question in this case is an open one in this Court, the decisions in *Fibreboard* and *Darlington*, *supra*, embody principles favoring petitioner's position—that management, responsible for allocating the capital and basic resources of the enterprise, is entitled (as well as being in significant respects *obligated*) to decide without collective bargaining when a plant or facility comprising less than all of the business should be closed down in the exercise of a legitimate business judgment. The "legitimacy" of the judgment thus identified includes, importantly for present purposes, that it rests upon genuine economic concerns and is not motivated at all by hostility to a union. The absence of antiunion animus is an undisputed circumstance in the present case.

Given this key circumstance, the decisions in *Fibreboard* and *Darlington* supply important guidelines toward a sound resolution of the problem now presented. *Fibreboard*, sharply limiting a far more sweeping decision by the Board, found a violation of the duty to bargain on the closely confined facts of a case in which the employer, by subcontracting, transferred a portion of its work from its own employees, represented by a union, to the employees of another employer. In other words, there was in effect a *substitution* displacing the workers represented by the complaining union. *Darlington* held that an employer could close one of its plants entirely, eliminating the jobs of all those represented by the union, without committing

the unfair labor practice proscribed by either § 8(a)(3)[2] or § 8(a)(1)[3] of the NLRA.

While the relationship is not one of pure logic or mathematics, the instant case would seem to come much closer to the result in *Darlington* than to that in *Fibreboard*. Indeed, in the vital and uncontroverted fact that there was no element of hositility against the union, this case is far stronger for the employer than *Darlington*. It should emerge, upon revisiting that decision, that there would be considerable incongruity in holding that discharges of all the employees upon the closing of a facility cannot be held unlawful and reversed under § 8(a)(3), but that such a decision to close the plant should turn out after all to be an unfair labor practice under § 8(a)(5), leading to substantial back pay liability to the employees who lost their jobs. The suggested incongruity is more than a concern for symmetry in the law. It reflects the fundamental point that *Darlington* marks boundaries in which management's unilateral authority must be deemed commensurate with management's unique responsibility to conduct the enterprise, direct investment, allocate capital, decide on directions of growth and retrenchment—in a word, to manage the business. The kind of partial termination involved in this case is well within those boundaries.

A. *Fibreboard* Dealt Narrowly with a Clearly Distinguishable Case of Substituting Employees Continuing the Same Work by Contracting Out Rather than Closing or Terminating Part of the Enterprise

The "carefully limited decision in Fibreboard" (Kearse, J., concurring and dissenting below, App. A at 17) is argued at

---

2 "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1973).

3 "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1973).

length in petitioner's brief. For reasons there developed, the opinions of Chief Justice Warren and Justice Stewart (joined by Justices Douglas and Harlan) are not thought by anyone to control decision here. As petitioner shows, however, the opinions read together, as they must be, defend robustly a substantial domain lying "at the core of entrepreneurial control." 379 U.S. at 223 (Stewart, J., concurring).

This *amicus* joins in, without repeating, petitioner's submissions on *Fibreboard*. We turn to a fuller presentation concerning the *Darlington* case, which is, in our view, powerfully supportive of petitioner's position.

B. The Premises and Principles of This Court's Decision in *Textile Workers Union* v. *Darlington Manufacturing Co.* Show That a Partial Closing, Not Motivated by Anti-union Animus, Cannot Constitute an Unfair Labor Practice

In *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), this Court held that an employer, though motivated by antiunion animus, does not violate § 8(a)(3) of the Labor Act if (1) it closes its *entire business* for any reason whatever, or (2) it closes one of several plants, provided in this latter case the employer is not "motivated by a purpose to chill unionism in any of the remaining plants . . . and . . . may reasonably have foreseen that such closing would likely have that effect." *Id.* at 275.

Strictly speaking, the case dealt with § 8(a)(3), not § 8(a)(5), which is involved here. The underlying premises, however, and the logic of the decision leave no tenable ground for holding that an employer, without any antiunion animus, violates § 8(a)(5) by a partial closing that has not been a subject of advance bargaining with the union.

The *Darlington* opinion, written by Justice Harlan for a unanimous Court,[4] started from the proposition that a decision to shut down all or part of a business is plainly within the

4 Justices Stewart and Goldberg did not participate. *Id.* at 277.

realm of "management prerogative." *Id.* at 269, 276. Thus, in speaking of *total* closings, the Court characterized actions of this nature as "peculiarly matters of management prerogative . . . ." *Id.* at 269. The language was not significantly dissimilar when the Court talked of the essential findings required before a *partial closing* could be deemed an unfair labor practice. Except for the special circumstances of discriminatory motive and purpose that could ground a finding of an unfair labor practice, the Court noted that a decision to shut down part of the enterprise is among "otherwise legitimate employer prerogatives. . . ." *Id.* at 276.

The word "prerogative" aptly describes subjects for management's determination outside the scope of mandatory bargaining. *See, e.g., Fibreboard, supra*, 379 U.S. at 226 (Stewart, J., concurring); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 549 (1964); *NLRB* v. *International Harvester Co.*, 618 F.2d 85, 86 (9th Cir. 1980); *NLRB* v. *Adams Dairy, Inc.*, 322 F.2d 553, 556 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972), *enforced*, 71 Lab. Cas. ¶ 13,613 (7th Cir. 1973); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 569 (1966); Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 393, 421, 430, 431, 432 (1950). It is not to be supposed that the word was employed by this Court, in a case where § 8(a)(5) had actually been implicated, *see* 380 U.S. at 267 n.5, without intending this clear and apposite meaning. But we proceed beyond the significant word to recall the course of this Court's reasoning and its powerful significance for the present case.

The closing of the mill in *Darlington*, accomplished with animosity towards the union as a motivating cause, entailed inescapably a "failure of the Company to bargain with the union with respect to the tenure of employment of the employees" who lost their jobs as a result of the shutdown. The quoted language, fairly describing the events, is from the dissent in the Fourth Circuit in *Darlington Manufacturing Co.* v. *NLRB*, 325 F.2d 682, 694 (4th Cir. 1963) (Bell, J., dissent-

ing). Had that dissent prevailed, the Board would have been upheld in its finding of a violation of § 8(a)(5) as well as § 8(a)(3). When, however, the Fourth Circuit's majority view was sustained, the two species of violations fell together. The hostile action in *Darlington* in closing the plant, aimed against the union, was not a violation of § 8(a)(3) absent the further antiunion effects elsewhere that might alter that conclusion under this Court's decision. It was by the same token no violation of the duty to bargain under § 8(a)(5). The latter conclusion should follow *a fortiori* in a case like the present one, where the closing is not prompted by antiunion animus but solely by legitimate business considerations.

To restate this thought, which seems important, in terms of this Court's decision in *Darlington*: Even where a plant closing is triggered by hostility to a union, the discharges thereby accomplished are not violative of § 8(a)(3), absent the broader antiunion motive and purpose *Darlington* defined. This undercut in *Darlington* a finding of a § 8(a)(5) violation "in part based on the determination that the plant closing was an unfair labor practice" under § 8(a)(3). 380 U.S. at 267 n.5. And the Board's position based upon that premise was not accompanied by any "argument . . . that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." *Id.*

In the position it now espouses, however, the Board makes the argument it did not attempt in *Darlington*, and seeks in practical effect to nullify the "prerogative" vouchsafed to employers under that decision. This is not to suggest, obviously, any attempt at stealth or evasion. It is merely to make plain the consequences of the Board's view and to urge that such consequences would accomplish essentially the results *Darlington* should bar—the reversal of the employer's decision to close and reinstatement of the employees with back pay. If mere logic, on a strict sorting of premises, would countenance such a result, it is difficult to say the same for a rational scheme of law.

At least three Circuits—the Fourth, Eighth, and Tenth—have so held, somewhat more briskly, on the basis of this Court's decision in *Darlington*. *NLRB* v. *Edward M. Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615 at 21,635-36, *reported without published opinion*, 541 F.2d 277 (4th Cir. 1976); *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 257-58 (8th Cir. 1970); *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969); *NLRB* v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897, 902 (8th Cir. 1965). Those decisions interpret accurately the import of what this Court held. Unless *Darlington* itself, and its basic conception of management's authority to effect plant closings, is to be overturned, the Board's position herein should be rejected.

II.

THE BOARD'S INCONSISTENT POSITIONS, AND THE DIVERGENT VIEWS OF THE SECOND AND THIRD CIRCUITS, ARE UNWORKABLE AND UNPREDICTABLE FETTERS ON MANAGERIAL DISCRETION

As reflected in the preceding discussion, until the decision in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (3d Cir. 1978),[5] and that of the Second Circuit here under review, the Courts of Appeals had uniformly rejected the Board's view that an employer, acting for business reasons and without antiunion motivation, commits an unfair labor practice by failing to bargain respecting a decision to close a plant or terminate an operation. *See* cases in preceding paragraph and others treated in petitioner's brief.[6]

---

5 The Board's decision on the Third Circuit's remand, 251 N.L.R.B. No. 23 (1980), is before that Court on petition for review, No. 80-2327.

6 Until their recent departures, the Second and Third Circuits had appeared to be aligned with the others. See *NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 195-96 (3d Cir. 1965); *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 172 (2d Cir. 1961). But the majorities, in both the instant case and in *Brockway*, distinguished those prior cases.

(footnote continued on next page)

Adhering to its view, the Board has continued to apply a "*per se*" rule (*see* App. A at 10) imposing a duty to bargain in cases of *closings* or *shutdowns* but finding no duty to bargain in what it has deemed distinguishable cases where the employer *sold* a plant or ceased entirely to perform a particular type of business activity.[7] The result, we believe, is a set of disorderly and unprincipled administrative directives in which there is not the requisite guidance for those regulated. The confusion is not relieved, it is increased, when the courts proceed, as have the Second and Third Circuits, to reject the agency's rationale and nevertheless to sustain the agency's position on rules fashioned by them to govern labor-management relations.

A. The Board's Decisions Reach Differing Results On Distinctions That Should Make No Difference

In its main case on this subject, *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), the Board undertook to follow *Fibreboard,* reasoning along the way (*see* pp. 568-69) that the requirement of bargaining before contracting out applies *a fortiori* to a case in which an employer closes down one of its

---

The Court of Appeals here indicated that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* decision (App. A at 9 n.4). The Third Circuit in *Brockway* viewed its earlier decision in *Royal Plating* as applicable only to instances where economic necessity forces termination of a failing business, and not as relieving employers of bargaining obligations over decisions to close prompted by less severe economic pressures. *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 732. Judge Rosenn, dissenting, said that the Court's decision "depart[ed] from the principles of [the] court's landmark decision in *NLRB* v. *Royal Plating & Polishing Co.*," 582 F.2d at 741. The Court in *Royal Plating*, Judge Rosenn said, "took great pains to distinguish the reasoning of [*Fibreboard*]." He could find nothing in the earlier opinion "limit[ing] the rule enunciated to . . . [the] narrow case" of economic necessity. *Id.* at 743.

7 The Board also excepts some rare cases in which the circumstances prompting the closing are entirely beyond the control of either the union or the employer. *See Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76 (1979) (no duty to bargain over closing of sawmill because of insufficient supply of timber). Other situations treated differently—and, in our view, irreconcilably—are mentioned below, pp. 15-16 n.8.

plants. For reasons elaborated by petitioner, and elsewhere herein, we believe the Board misread *Fibreboard* and, perhaps more clearly, *Darlington*. At this juncture, we note that from *Ozark Trailers* itself, and more clearly from the Board decisions following it, there has emerged what the court below and others have fairly described as a "*per se* rule"—"imposing a duty to bargain whenever an employer closes part of its business" (App. A at 10). *See Brockway*, 582 F.2d at 732.

In what might have seemed at first to be a retreat, but is now entrenched as an anomaly, the Board, in *General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW* v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972), held that an employer's decision to *sell* a portion of its enterprise is not a mandatory subject of bargaining. The explanation for that result is quoted here at length in the view that it cannot subsist with the position of the Board (and the court below) in the present case:

> Consistent with the expressly restricted scope of *Fibreboard*, the courts have sustained the Board's position in subcontracting cases, but rejected Board decisions requiring bargaining over more elemental management decisions, such as plant closings and plant removals.
>
> It appears that the Board has not dealt definitively with the specific question whether the Act imposes a duty to bargain over a decision to sell an employing enterprise. We believe, however, that this issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employement [*sic*], or other conditions of employment." Such managerial decisions ofttimes require secrecy as well as the freedom to act quickly and decisively. They also

> involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives.
>
> We therefore disagree with the Trial Examiner here, who found that "[i]n the instant case Respondent made a managerial decision but hardly one lying at the core of the entrepreneurial control." A decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much "at the core of entrepreneurial control." [*Id.* at 951-52 (emphasis in original).]

A scholar reading that account could understandably say that the Board's *General Motors* decision "appear[ed] to reject every premise of [the] decision in *Ozark Trailers*." R. GORMAN, LABOR LAW 520 (1976). Others, including the Board's own administrative law judges, to say nothing of employers and unions, might have reached a similar conclusion. But, as the present proceeding reflects, the Board has attempted to preserve the *per se* rule of *Ozark Trailers* along with *General Motors*.

The consequent bewilderment is well illustrated by the *Brockway* case, especially in the Board's proceedings after the remand from the Third Circuit. An experienced Administrative Law Judge, after hearing the evidence declared relevant by the Court of Appeals (*see* p. 17, *infra*), absolved Brockway of the § 8(a)(5) charge. He wrote, *inter alia* (251 N.L.R.B. No. 23, slip op. of ALJ decision at 16):

> [T]he Board has, since *Ozark Trailers*, continued to rely on that decision as the touchstone for imposing upon an employer the duty to bargain with an incumbent union over an economically motivated determination to close a plant. However, the conclusion reached herein that Brockway did not unlawfully shirk that duty does not appear to be entirely at war with the Board's decisional trend in this area. In its initial decision in this proceeding, the Board noted that there was no evidential showing that Respond-

> ent's decision to close the Philadelphia branch "involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and direction of the enterprise,' " citing to its decision in *General Motors Corp.* By this notation, it can only be assumed that *General Motors Corp.* is still alive and well and that, if such a showing had been made, the ultimate result herein might have been different.
>
> In short, I am convinced and conclude that Brockway's economic interests in this case which impelled the sudden closure of the Philadelphia branch were of such magnitude and immediacy as to make unfair the imposition of a duty to bargain with the Union over its decision to shut down the facility. Accordingly, I shall recommend that the complaint herein be dismissed in its entirety.

But the Board rejected that recommendation. Without mentioning *General Motors*, the Board concluded that Brockway had violated § 8(a)(5) when it closed, but did not sell, a Philadelphia branch without bargaining. *Id.*, slip op. at 10. The result verges on the ludicrous when we attend to the fact that Brockway *had tried in vain to sell* the branch in question; had maintained the unsalable operation through a long course of heavy losses; and effected this closing as one of a series of similar shutdowns terminating an entire division of the enterprise. *Id.*, slip op. at 6-7, slip op. of ALJ decision at 9-12.

Other incongruities in the Board's relevant jurisprudence are assigned here to a long footnote.[8] The point, sufficiently

---

8 *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972), *enforced*, 79 Lab. Cas. ¶ 13,613 (7th Cir. 1973), could have seemed to continue the withdrawal suggested by *General Motors*. The Board there found no duty to bargain over a decision to close, *without selling*, a manufacturing plant. So held even upon a finding that "the closing was discriminatorily motivated." *Id.* at 479. The reason given was that the employer, though staying in business elsewhere, was giving up the manufacturing "part of the business" and would not be using elsewhere the skills of the employees losing their jobs. We would submit

(footnote continued on next page)

illustrated, is that the Board has led itself, and those it regulates, into a maze. The *Ozark Trailers* rule, the propriety of which is the subject most properly before this Court (*see* p. 17, *infra*), is demonstrated to be unacceptable, even to the Board. The distinction between a sale and a closing where a sale is not or cannot be made is a distinction that can make no rational difference for the purposes at hand. A rule so misconceived, from an agency commissioned to give expert direction, should not be held acceptable.

---

the result is not consistent with *Ozark Trailers* and no less clearly with the principles of *Darlington* reviewed earlier.

A case of the same kind, subject to the same criticism, is *Stanley Oil Co.*, 213 N.L.R.B. 219 (1974).

The weaknesses of a rule turning on the manner in which the employer disposes of the facility are even more apparent in the Board's recent decision in *National Car Rental System, Inc.*, 252 N.L.R.B. No. 27 (1980). There, the Board held that an operator of car and truck rental facilities was not required to bargain over its decision to sublet one such facility, assign some of its lease accounts, and sell some of its trucks to another operator. The employer remained in business locally, transferring the remainder of its assets from the subleased facility to a new one at a nearby location, to which it refused discriminatorily to consider transferring any of the union represented employees who had previously worked at the subleased facility. The Board, relying on *General Motors*, found this to be a decision involving " 'a significant investment or withdrawal of capital' " and "affecting the 'scope and ultimate direction of an enterprise' ", 252 N.L.R.B. No. 27, slip op. at 15—a surprising statement with respect to a business that has hundreds of outlets throughout the country. The plain import of the facts—that this reallocation of capital was of a decidedly smaller relative scale than that in *Brockway* or *General Motors*—was submerged, while the form of the transaction was given decisive weight. The presence of a sale—even if what is sold is only one element of the transaction—appears to be the Board's talisman for avoiding application of the *Ozark Trailers* rule. The realities of both management needs and labor's concerns are erased along the way.

Reviewing the course of these decisions, Professor Gorman has said: "These distinctions are quite fine, indeed one might say barely perceptible, and have created difficulties for administrative law judges trying to apply Board precedent, divisions within the Board membership itself, and uncertainty for employers." R. GORMAN, LABOR LAW 519 (1976).

B. The Divergent "Presumptions" of the Second and Third Circuits Tend to Aggravate Rather Than Repair the Discordant and Unpredictable Course of Board Decisions

Both the Third and the Second Circuits, while prepared to uphold results reached by the Board via its *Ozark Trailers* rationale, have explicitly rejected the rationale. The Third Circuit in 1978 adopted a "presumption" and a balancing test under which a partial closing is mandatorily bargainable unless the employer shows that its "interests . . . [are] in fact of a magnitude and immediacy that would make unacceptable and unfair the imposition of a duty to bargain." *Brockway, supra*, 582 F.2d at 739.[9] The Second Circuit also disagreed with the Board, adopting a presumption like the Third Circuit's, but then disagreeing with the latter Court as well, ruling that its presumption may be rebutted "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" in a particular case. (App. A at 12.)

Both Courts would seem to have departed from the settled principle "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). The resulting confusion, within as well as between Circuits, evidences again the solid doctrinal basis on which *Chenery* rested. The principle there stated enforces an important division of functions as between courts and agencies. When the lines are breached and blurred, as they now are in the present context, the needs for direction and predictability of those subject to administrative regulation are seriously disserved.

---

9 The *Brockway* court refused to enforce the Board's order because the record did not reveal the economic circumstances that prompted the closing, thus frustrating the task of applying the balancing test. But the Third Circuit later applied the *Brockway* test to enforce a Board order premised expressly on *Ozark Trailers* in *Electrical Products Div. of Midland-Ross Corp.* v. *NLRB*, 617 F.2d 977, 982-83 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3249 (No. 80-67, Oct. 6, 1980), *enforcing* 239 N.L.R.B. 323 (1978).

It is a nice question, for example, what the law on this subject actually is in the Third Circuit. The Board, taking the remand, accepted as the "law of this case" (251 N.L.R.B. No. 23, slip op. at 13), the Court's presumption and balancing test. The quoted expression appears to mean only what it says—that the Third Circuit's rule will govern only this (*Brockway*) case. This is in itself a slightly tense and awkward conception for a regulatory regime embracing three industrial states.[10]

A question not less difficult concerns the effective meaning, if any, of the differences between the Board's and the Court's rule. We have mentioned the perplexity and the wrong guess experienced by an able ALJ in coping with this situation, pp. 14-15, *supra*. The Board itself took the Circuit's balancing test, rejected the ALJ's handling of that test on an evidentiary record, and substituted speculation adverse to the employer as grounds for finding again an unlawful failure to bargain. The ALJ found from this record that "pressing economic urgency [had] impelled the decision to close" and that collective bargaining "could not have reasonably been expected to reverse or forestall" the decision. 251 N.L.R.B. No. 23, slip op. of ALJ decision at 15. The Board saw no "need for 'immediate action'," and opined that there would have been "room for productive bargaining . . . which at the very least could have resulted in a deferral of the timing of the closing." *Id.*, slip op. at 10-11. It is difficult in this light to imagine a case in which an employer could overcome the Third Circuit's presumption of mandatory bargainability. *See* Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing is a Mandatory Subject of Bargaining*—Brockway Motor Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978), 47 GEO. WASH. L. REV. 679, 697 (1979) (*Brockway* approach "so uncertain in its application that it renders any exception to the duty to bargain largely illusory").

---

10 The Third Circuit Court of Appeals has commented, without pleasure, upon the Board's adherence to positions rejected in judicial review proceedings. *See Allegheny Gen. Hospital* v. *NLRB*, 608 F.2d 965, 966, 970 (3d Cir. 1979).

Somewhat similarly, the Second Circuit administered its differently limited presumption to defeat the employer's position on the basis of what the union "might have" done if the employer had bargained about the decision to leave Greenpark (App. A at 14). Again, the presumption is so impregnable that it may be doubted whether the stated possibility of rebuttal is real.[11] The absence of any opportunity to overcome the presumption (note 11, *supra*) may be a loss in form only. The rule of *Ozark Trailers*, said to be unacceptable in the court below, may have prevailed after all.

That *per se* rule is snarled in the objections and self-contradictions reviewed above. It should be rejected by this Court, as it has been by every court that has considered it.

In any event, whatever the rule of decision below is thought to be, it enforces an unrealistic and unwarranted restriction on effective decision-making that is clearly within the ambit of management's proper discretion. At least where there is, as here, no motivation hostile to the union, the requirement to bargain before deciding to close a portion of the business is not fairly found in the statute or in a sound sense of the statutory policy governing labor-management relations.

---

11 Perhaps adding to the doubt, the court below did not bother to remand, as had the Third Circuit, for consideration by the Board in light of the new presumption. The employer, which had tried the case and had it decided under the Board's supposedly different regime of *Ozark Trailers*, was said by the Court to have "offered no evidence to rebut the presumption arising from the literal application of the statute" (App. A at 13).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MARVIN E. FRANKEL
SAUL G. KRAMER
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 593-9000

Attorneys for the Chamber of Commerce of the United States, *Amicus Curiae*

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3186

February, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
DANIEL E. BENSING
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae Washington Legal Foundation.

February 26, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4621

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. hereby moves, pursuant to Supreme Court Rule 36 for leave to file the annexed brief *amicus curiae* in support of petitioner in the above-captioned proceeding. Consent to the filing of this brief has been obtained from counsel for petitioner; counsel for respondents has been contacted and has indicated that he objects.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative pro-

cess in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); and *Rostker v. Goldberg,* No. 80-251 (filed July 18, 1980).

The Washington Legal Foundation believes that it is in the public interest to guarantee businessmen the authority to allocate capital and close down unproductive facilities for economic reasons without undue interference by federal agencies or the courts. The decision of the Second Circuit, by unnecessarily restricting these economic freedoms inherent in the free enterprise system, is inconsistent with the purposes and goals of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only is petitioner injured by this decision; many other business enterprises seeking to relocate or close down unproductive facilities are likewise threatened with economic harm. Restrictions on economic freedom, such as those imposed by the decision of the Second Circuit, injure labor as well as business, and interfere with all sectors of the economy in manners which the parties to this proceeding have not brought to the full attention of this Court.

Accordingly, the Washington Legal Foundation requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

Daniel J. Popeo
General Counsel

Paul D. Kamenar
Director of Litigation

Daniel Bensing
Staff Attorney

Washington Legal Foundation
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT

I. AN EMPLOYER DOES NOT HAVE A DUTY TO BARGAIN WITH A UNION OVER AN ECONOMICALLY MOTIVATED DECISION TO TERMINATE ONE PORTION OF AN EXISTING ENTERPRISE 4

II. ASSUMING, *ARGUENDO*, THAT THERE IS A PRESUMPTIVE DUTY TO BARGAIN AS HELD BY THE SECOND CIRCUIT, THERE WAS NO DUTY TO BARGAIN IN THE INSTANT CASE BECAUSE THE BARGAINING WOULD HAVE BEEN FRUITLESS AND THEREFORE WOULD NOT HAVE SERVED THE PURPOSES OF THE ACT 9

III. THE IMPOSITION OF A DUTY TO BARGAIN IN THIS TYPE OF CASE IS CONTRARY TO PUBLIC POLICY BECAUSE SUCH A REQUIREMENT WILL HAVE THE EFFECT OF IMPAIRING BUSINESS MOBILITY, SLOWING ECONOMIC GROWTH, AND HARMING THE NATIONAL ECONOMY 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977). 6

Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978) 8, 10, 12

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). 5, 6, 7

Cases, continued: Page

NLRB v. Edward M. Rude Carrier Corp., 79 Lab. Cas. 21,633 (4th Cir. 1976) 7

NLRB v. First National Maintenance Corp., 627 F.2d 596 (2d Cir. 1980) 10

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 4

NLRB v. Rapid Bindery Inc., 293 F.2d 170 (2d Cir. 1961) 8

NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965) 8

NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969) 7

NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) 7

Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) 7

Textile Workers Union v. Darlington Manufacturing, 380 U.S. 263 (1965) 5, 6

Statutes:

National Labor Relations Act, 29 U.S.C. §§151 *et seq.* . . . . . *passim*

29 U.S.C. §158(a)(5) 4

29 U.S.C. §158(d) 4, 8

Miscellaneous:

McKenzie, R., *Restrictions on Business Mobility, A Study in Political Rhetoric and Economic Reality* (1979) 13

Note, *"Partial Terminations" – A Choice Between Bargaining Equality and Economic Efficiency*, 14 UCLA L. Rev. 1089 (1967) 12

Siegan, B., *Economic Liberties and the Constitution* (1980) . . . 6

Wall Street Journal, February 17, 1981 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the

following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); and *Rostker v. Goldberg,* No. 251 (filed July 18, 1980).

The Washington Legal Foundation believes that it is in the public interest to guarantee businessmen the authority to allocate capital and close down unproductive facilities for economic reasons without undue interference by federal agencies or the courts. The decision of the Second Circuit, by unnecessarily restricting these economic freedoms inherent in the free enterprise system, is inconsistent with the purposes and goals of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only is petitioner injured by this decision; many other business enterprises seeking to relocate or close down unproductive facilities are likewise threatened with economic harm. Restrictions on economic freedom, such as those imposed by the decision of the Second Circuit, injure labor as well as business, and interfere with all sectors of the economy in

manners which the parties to this proceeding have not brought to the attention of this court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the case contained in the Petitioner's Brief for Writ of Certiorari.

SUMMARY OF ARGUMENT

Amicus submits that the decision of the Second Circuit holding petitioner guilty of an unfair labor practice is contrary to the purposes of the Act, against sound public policy, and therefore should be reversed. The National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, was never intended to require employers to bargain over any management decision which might conceivably have an impact on the terms and conditions of employment. The decision to close down or transfer a facility, when made for purely economic reasons, is reserved to the discretion of the employer. The purposes of the Act would not be served by mandatory bargaining in such situations.

Amicus further submits that it is not in the public interest for the phrase "terms and conditions of employment" in the Act to be given a sweeping and overbroad application. By imposing a duty of collective bargaining in the case of plant closings, the decision impairs business mobility and interferes with the free allocation of capital. These economic freedoms are crucial to the proper functioning of the free enterprise system and the continued prosperity of the American people.

That does not mean that workers may not contract with employers whereby employers may agree to notify employees before plant closings and the like. However,

any across-the-board restrictions on the ability of businesses to close all or part of their operations for economic reasons should come from the legislative rather than the judicial branch.

I.

AN EMPLOYER DOES NOT HAVE A DUTY TO BARGAIN WITH A UNION OVER AN ECONOMICALLY MOTIVATED DECISION TO TERMINATE ONE PORTION OF AN EXISTING ENTERPRISE.

The purpose of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, is to encourage the peaceful resolution of labor disputes through collective bargaining. The role of government is not to step in and resolve disputes between employers and employees, but rather to provide mechanisms whereby the parties may resolve the disputes themselves. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937). Consistent with this statutory goal, it is an unfair labor practice, and therefore a violation of federal law, for an employer to "refuse to bargain collectively with the representatives of his employees. . . ." National Labor Relations Act §8(a)(5), 29 U.S.C. §158(a)(5) (1975) ("the Act").

Collective bargaining is defined in section 8(d) of the Act as follows:

> (d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and terms and conditions of employment. . . .

The issue in this case is whether the decision of an employer to terminate a portion of his business operations,

for purely economic reasons, and with no indication of anti-union animus, constitutes a "term or condition of employment" which is the subject of mandatory collective bargaining.

Amicus submits that a managerial decision to terminate a portion of a business operation for purely economic reasons never gives rise to a duty to bargain because such decisions "lie at the core of entrepreneurial control" of management. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 223 (Stewart, J., concurring). The decision of the Second Circuit holding that there is a rebuttable presumption of a duty to bargain is incorrect, would not serve the purposes of the Act, and therefore should be reversed.

In two decisions, the Supreme Court addressed the general question of whether there is a duty to bargain over the decision to close a portion of an ongoing business. In *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), the Supreme Court held that "the replacement of employees in [an] existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . . is a statutory subject of collective bargaining." *Id.* at 215. The decision was limited to this particular form of contracting out and did not address the broader ramifications of partial closings.

Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263 (1965), involved a plant closing motivated solely by anti-union animus on the part of the employer. This Court nevertheless held that if the plant at issue was found to be a separate business unrelated to other plants owned by a parent company, it would not be an unfair labor practice to close the plant, even if motivated by anti-union animus. *Id.* at 269-270. How-

ever, if the plant was found to be a part of a larger, integrated group of subsidiaries, the partial closing would be an unfair labor practice if the purpose was to discourage unionism in any of the employer's remaining plants and if the employer may reasonably have foreseen such an effect. *Id.* at 275. The case was then remanded to the lower court for further fact-finding.

Although both of these decisions were narrowly limited to the facts of the case, *amicus* submits that Justice Stewart's concurrence in *Fibreboard* provides the framework for a proper analysis of the meaning of these two decisions. 379 U.S. 203, 218 (Stewart, J., concurring). Justice Stewart initially recognized that the words of the statute are words of limitation. The National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, does not confer on employees the right to bargain over *any* subject that interests them or that may possibly affect their employment, but only over a limited category of issues. *Id.* at 220.

Amicus submits that any statutory prohibition or restriction on the rights of management or workers to operate in a free-market economic system should be narrowly construed lest constitutional rights be infringed. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *see generally* B. Siegan, *Economic Lberties and the Constitution* (1980).

While employment security may be a proper subject of bargaining, the right of an employer to make decisions about capital allocation without undue hindrance must also be considered. As stated by Justice Stewart:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this

> alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

379 U.S. at 223, (Stewart, J., concurring).

Accordingly, the purposes of the Act, and the interests of labor generally, will best be served by a narrow interpretation which leaves businessmen free to make entrepreneurial decisions without undue interference by unions or government.

A majority of the Circuits have followed Stewart's reasoning and found no duty to bargain where the decision to terminate is based on valid financial considerations. These courts properly recognize that the purpose of the Act will not be served by interference with the free allocation of capital and the employer's right to make essential business decisions. *Royal Typewriter Co. v. NLRB,* 533 F.2d 1030 (8th Cir. 1976); *NLRB v. Edward M. Rude Carrier Corp.,* 79 Lab. Cas. 21,633 (4th Cir. 1976); *NLRB v. Thompson Transport Co.,* 406 F.2d 698 (10th Cir. 1969); *NLRB v. Transmarine Navigation Corp.,* 380 F.2d 933 (9th Cir. 1967).

Before the decision of the Second Circuit in the instant case, only the Third Circuit had found a duty to bargain in the case of the termination of a portion of a business enterprise. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978). And even then, *amicus* submits that both the Second and Third Circuits were forced to use tortured interpretations to distinguish their own prior decisions *rejecting* a duty to bargain. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

It is clear that the weight of case law and the logic of the statutory scheme argue for a reversal of the decision of the Second Circuit. The National Labor Relations Act was never intended to give employees the right to bargain over any and all decisions by management which might conceivably have an impact on their employment security. Rather, *amicus* suggests that the langugage of the Act giving unions the right to bargain collectively over "terms and conditions of employment" does not mean "terms and conditions" of *un*employment where such unemployment results from economically motivated business decisions that assure profitability and the continued viability of the going concern. It was an established fact that the petitioner was "losing money" in the operation that was shut down. (A. 4).[1] Therefore, the Washington Legal Foundation urges this Court to resolve the conflict among circuits by reversing the decision of the Second Circuit in the instant case and adopting the more reasoned and moderate interpretation of section 8(d) of the Act by the Fourth, Eighth, and Tenth Circuits.

---

[1] "A." refers to the Appendix in the Court of Appeals.

II.

ASSUMING, *ARGUENDO*, THAT THERE IS A PRESUMPTIVE DUTY TO BARGAIN AS HELD BY THE SECOND CIRCUIT, THERE WAS NO DUTY TO BARGAIN IN THE INSTANT CASE BECAUSE THE BARGAINING WOULD HAVE BEEN FRUITLESS AND THEREFORE WOULD NOT HAVE SERVED THE PURPOSES OF THE ACT.

Petitioner provides housekeeping and maintenance services for various customers, including the Greenpark Care Center, the facility at issue in this case. (A. 2). Under the terms of its contract with Greenpark, petitioner provides all the necessary labor, supplies and supervision required to do the work and in return is reimbursed for its labor expenses and paid a management fee. (A. 43).

At the same time that the union[2] was in the process of being recognized as the bargaining agent for the employees of Greenpark, petitioner was coming to the realization that its operations at Greenpark were unprofitable and were not likely to move into the black in the future. (A. 4). Petitioner notified Greenpark on June 30, 1977 that if its management fee was not increased petitioner would have to terminate its operations at Greenpark effective midnight on July 31, 1977. (A. 72-73). After negotiations with Greenpark failed on July 25, petitioner informed its employees of the decision to terminate on July 31. (A. 41). Since there was a 30-day notice period of termination between petitioner and Greenpark, another month of economic loss would have

---

[2]District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

been incurred by petitioner if he had kept that operation going for another day.

The Second Circuit below agreed with the decision of the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978), that there is "an initial presumption . . . that a partial closing is a mandatory subject of bargaining." *Id.* at 735; *NLRB v. First National Maintenance Corp.*, 627 F.2d 596, 600 (2d Cir. 1980). However, this presumption may be rebutted by a "showing that the purposes of the statute would not be furthered by imposition of a duty to bargain." *Id.* at 601.

The facts here clearly establish that any negotiation between petitioner and the union would have been fruitless, because labor costs were simply not the reason for the unprofitability of its operations at Greenpark. Greenpark would have paid petitioner's full labor costs for the employees assigned to the facility regardless of the terms of the contract negotiated between petitioner and District 1199. Yet petitioner would still have been required to close down operations because the management fee it received from Greenpark was inadequate and despite extended negotiations, Greenpark refused to raise this fee. Therefore, as Judge Kearse recognized in her dissent, petitioner's decision to close down Greenpark was made solely for economic reasons; labor costs were not a relevant factor in petitioner's loss of money and no purpose would have been served by collective bargaining. *Id.* at 604-605, (Kearse, J., concurring and dissenting in part).

The Second Circuit misinterpreted the facts of this case in applying its test for determining when there is a duty to bargain. In effect, the Second Circuit was supplying its own business judgment in hindsight for that of the experienced business enterprise. The purposes of the

Act simply would not have been served by collective bargaining in this case despite the wishful thinking of the Second Circuit. Therefore, the decision of the Second Circuit ordering collective bargaining should be reversed.

III.

THE IMPOSITION OF A DUTY TO BARGAIN IN THIS TYPE OF CASE IS CONTRARY TO PUBLIC POLICY BECAUSE SUCH A REQUIREMENT WILL HAVE THE EFFECT OF IMPAIRING BUSINESS MOBILITY, SLOWING ECONOMIC GROWTH, AND HARMING THE NATIONAL ECONOMY.

Just as the Constitution guarantees American citizens fundamental political freedoms and civil liberties, so does our free market economic system assure continuing prosperity and economic opportunity for all Americans. An unconstrained free market, permitting enterprises to make investment and pricing decisions without government control or interference has proven to be the most efficient system of economic organization in the last two centuries. The Washington Legal Foundation believes that restrictions on economic opportunity and freedom are to be avoided and should only be justified by the most compelling state interest.

Limited government regulation of serious health and safety problems may be necessary, but many federal regulations and court decisions in recent years have gone far beyond what is essential for the proper functioning of a free economy. *Amicus* submits that the broad holding of the Second Circuit in this case constitutes an unwarranted restraint on economic freedom and opportunity and therefore is contrary to public policy.

That does not mean, however, that workers cannot contract with their employer regarding prior notifications

of plant shutdowns and the like. However, such duty should not be automatically required across-the-board for all companies covered by the Act. As stated by Judge Rosenn in *Brockway:*

> If an employer must bargain before he can reach a decision to close a plant, how long must he continue to operate under possibly adverse, costly, and unprofitable conditions while the bargaining process goes on? How long must bargaining continue and who shall decide and by what criteria shall it be determined whether the bargaining has been sufficient? When the employer ceases bargaining, is he susceptible to a charge of bad faith or coercion? Must he engage in protracted litigation over a significant business judgment which may have to be implemented promptly, if it is to be made at all? These questions are unanswered by the majority and are treated as subsidiary to the ultimate question of whether there is a duty to bargain.

Brockway Motor Trucks v. NLRB, 582 F.2d 720, 748 (3d Cir. 1978) (Rosenn, J., dissenting). *See generally* Note, *"Partial Terminations" – A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. Rev. 1089 (1967).

Business, in order to maximize profits and thereby enhance the general welfare, must be free to establish, transfer and terminate operations when the market dictates. Of special importance is the freedom to transfer plant and equipment from unproductive declining areas of the country, to those areas where labor, raw materials and markets are most favorable. This issue has aroused substantial public interest across the political spectrum because of a perceived shift of economic resources from the north and northeast (the so-called "snow-belt" states)

to the south and west (the "sun-belt" states).[3] Legislation has even been proposed at the state and federal level to penalize such shifts in economic resources or to require companies considering such moves to provide notice several years in advance and negotiate with labor unions and local governments.[4]

Because *amicus* believes that the decision of the Second Circuit would have the same harmful effects on business mobility and economic growth as would this legislation, the Washington Legal Foundation encourages this court to seriously consider the economic effects of its decision. *Amicus* further submits that the solution to this whole problem is best left not to the judicial branch, but to the legislative forum where it can be subject to full public debate. See R. McKenzie, *Restrictions on Business Mobility, A Study in Political Rhetoric and Economic Reality* (1979) for an excellent analysis of the economic costs of laws impairing the free movement of capital.

Change and development is the sign of a healthy economy; restrictions on such changes can only harm the

---

[3]Concern among northern political and labor leaders that American business would completely desert cities such as Cleveland, Dayton, Detroit, and Boston for the sun-belt has proved to be unwarranted. The American economy, although seriously ill, has displayed incredible resiliency, as a comparison of regional economic growth rates indicates. The New England region, for example, once considered an economic basket case, has turned around in recent years. Wall Street Journal, February 17, 1981, at 30, col. 1. Business mobility, when unhindered, will allocate capital where the return is greatest and all areas of the country will benefit. Restrictions on business movement, such as a judicially-imposed duty to bargain before plant closings, will create economic inefficiencies and make it more difficult for less prosperous regions to reverse their growth patterns.

[4]*See* R. McKenzie, *Restrictions on Business Mobility* 1 (1979).

American economy and impair our competitiveness in the world market. For these reasons, *amicus* believes that the decision of the Second Circuit, which imposes unnecessary and harmful burdens on businesses seeking to transfer or shut down unprofitable operations, should be reversed.

CONCLUSION

The decision of the Second Circuit holding that employers are presumed to have a duty to bargain with employees over an economically motivated business decision to terminate a portion of a business enterprise is incorrect and should be reversed. The purpose of the National Labor Relations Act would never be served by collective bargaining in such circumstances, a fact which has been recognized by most of the courts which have addressed this issue. Such bargaining, on the other hand, could seriously impair business mobility, interfere with free movement of capital, and generally injure our free

market economic system. For all of these reasons, *amicus* urges this court to reverse the decision of the Second Circuit and free employers from the duty to bargain with unions before closing a portion of their operations for economic reasons.

Respectfully submitted,

Daniel J. Popeo
General Counsel

Paul D. Kamenar
Director of Litigation

Daniel Bensing
Staff Attorney

Washington Legal Foundation
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240

February 26, 1981